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A  
GENERAL ABRIDGMENT  
AND  
DIGEST OF AMERICAN LAW,

WITH OCCASIONAL

**Notes and Comments**

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BY NATHAN DANE, LL. D.

COUNSELLOR AT LAW

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IN EIGHT VOLUMES.

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A

# General Abridgment

OF

# AMERICAN LAW.

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## CHAPTER CLXXVII.

### CERTAIN PLEADINGS.—OYER &c. &c.

**A**FTER the usual time for pleading in abatement, and before pleas in bar, there often intervene several pleas, which seem to have no particular place in a system of pleadings; as 1. *Oyer* of deeds: 2. Voucher: 3. Aid prayer: 4. Parol demurrer: 5. Cognizance claimed: 6. Tender, &c.: 7. Protestandoes: 8. Estoppels: 9. Averments, giving colour, &c.: 10. Notice and request: 11. Pleas since the last continuance. These several branches in pleading, may here be briefly considered in this order, or referred to.

#### ART. 1. *Oyer of deeds.*

§ 1. In the cases of pleadings already stated, many rules and cases as to *oyer*, have been of course introduced; especially Ch. 164, in continuation with debt on bonds and records &c, a few cases only will here be added.

§ 2. Though profert is made of a deed, it is no part of the record, if *oyer* be not prayed of the deed. *Bender v. Fromberger.* 4 Dallas, 436.

§ 3. A declaration, with *oyer*, was served, and the declaration was amended, a copy of the amended declaration served; 1 Johns. Cas. 415, *Lifferts v. Byron.*

CH. 177. a *new oyer* not necessary to be delivered; the old *oyer* *Art. 1.* being deemed sufficient. *Oyer* is a French word, and means to hear.

1 Ld. Raym.  
352, Groin-  
velt v. Burril.  
4 D. & E. 371,  
Ferguson v.  
Mackreth.

§ 4. Held, a record may be pleaded without a *profert*, and so one may not have *oyer* of it. If one be convicted of felony or treason, one cannot have a copy of the conviction, but by the attorney-general's leave. 2 Caines' R. 176, as to *oyer*.

1 D. & E. 149.

§ 5. In debt on bond, the deft. after craving *oyer*, and setting it out truly, pleaded payment; and issue joined; and plt. gave notice of trial. The deft. returned the paper back, and set out a false *oyer* of the bond, and pleaded as before; upon which the plt. enrolled the true condition, and demurred. Court ordered all the pleadings to be struck out. The plt. had judgment; and the deft's. attorney was ordered to pay all costs.

2 Salk. 497,  
Morris' case.

§ 6. *Oyer* of a record is never granted, and *oyer* is not given on *profert*, unnecessarily made.

1 Ld. Raym.  
347, Theo-  
bald v. Long.

§ 7. The deft. pleaded another action pending in the same court for the same cause. Held, the plt. may pray *oyer* of the record, being in the same court; and if no *oyer* be given, the plt. may have judgment by default; for wherever a deed or record is pleaded, and *oyer* prayed, and *oyer* is not granted, the plea is no plea.

1 Salk. 215,  
Fitch v.  
Wells.

§ 8. *Non est factum* pleaded and found against the deed, it may be kept in court; but otherwise, on a collateral issue.

1 Ld. Raym.  
83, Ward v.  
Griffith.

§ 9. *Oyer* may be had of a recognizance, but is not grantable of errors, after the term in which the declaration is delivered; but the court will, in some cases, grant it *ex gratia* afterwards.

1 Salk. 215,  
Hill v. Aland.

§ 10. In cases in which the writing is but evidence, and the action is not grounded on it, the deft. cannot have a copy. It may be craved "of any specialty or written instrument, as bonds of all sorts, deeds poll, indentures, letters testamentary, of which *profert* is made."

2 Stra. 828,  
Hunter v.  
Wiseman.

§ 11. Where a prior recovery, in the same court, is pleaded, *oyer* must be granted. By *oyer*, the bond is made part of the declaration. 3 Cranch, 235.

2 Ld. Raym.  
969, case of  
Longueville.

§ 12. After the deft. has pleaded in abatement, he cannot have *oyer* of the original; 2 Salk. 498: for having *oyer* of the writ, is to enable him to plead in abatement; and Holt said, that was done already.

6 Cranch,  
257, United  
States v.  
Arthur.

§ 13. The want of *oyer* of the condition of a bond in a plea of performance, is fatal. Judgment is against him who commits the first error. 4 D. & E. 370.

§ 14. If a party be not bound to plead an instrument, with a *profert*, but he pleads it with one, it is but *surplusage*, and the court will not compel him to give *oyer* of it; as of letters patent, *private* statutes, &c.; yet if pleaded, may be taken as a part of the plea.

ART. 2. *Voucher*. This branch in pleadings has been already largely considered in its natural connexion with actions on covenants of *warranty* &c. in Ch. 124, art. 1 to 7.

ART. 3. *Aid prayer*,

§ 1. Or praying in aid, is a dilatory part in pleading, and is not much in use in American practice; still, however, it is sometimes used, and therefore, it is proper to attend to the principles of aid prayer. It is in practice only in actions concerning real estates. By it, the tenant calls to his aid, or to help him plead, another person, because of the feebleness of the tenant's own estate. Tenant for life may pray in aid of him who has the inheritance in remainder or reversion; that is, that he shall be joined in the action, and help to defend the title; and the heir, though he has never been in possession, or remainderman claiming under the same title, may be admitted to defend in ejectment; but not the devisee, who has not had possession: (on 11 Geo. II.)

§ 2. By this statute, joint-tenants and tenants in common may be compelled to make partition; and in it, it is provided, "that every of the joint-tenants or tenants in common, and their heirs, after such partition made, shall and may have aid of the other, or of their heirs, to the intent to deraign the warranty paramount, and to recover for the rate, as is used between co-parceners, after partition is made by the order of the common law." This statute has been adopted in Massachusetts as a part of our ancient common law.

Even a tenant *at will* may pray in aid.

§ 3. *Aid prayer, in what cases*. It is a general rule, that aid may be prayed in all cases in which the inheritance comes in question, as in *formedon*, writ of entry, and all real actions, except assize: so, in trespass or replevin, when the title to the inheritance is disputed; but not where this title to the inheritance does not come in question, by the pleadings, as in all *personal* actions where the general issue is pleaded; for then the title is not in question, as in the case of intrusion, &c. where the action accrues by the deft's. own act or wrong; as in partition, wherein the inheritance is not demanded: so, where there is no *privity*; nor where the demandant claims under the deft. himself, or under the same title; nor one deft. of another; nor of the plt.; nor unless prayed the term the deft. pleads. Any tenant *for life*, may have aid of him in remainder or reversion, in fee, or in tail:

CH. 177.  
Art. 3.

1 Salk 437.—  
Tidd, 529 —  
1 D. & E.  
149.—Dougl.  
476.

3 Bl. Com.  
299.

3 D. & E. 782.

31 H. VIII. 1.

1 Com. D.  
407.

1 Com. D.  
406.—1 Rol.  
161, 193, and  
the forms  
therein.—2  
Saund. 45, c.  
Wms' Notes;  
also, 45, d.—  
2 Bos. & P.  
386.

CH. 177. so, may tenant *at will*, or for *years* : so, may a *bailiff* or *servant*, deft., have aid of his master, if his title come in question : so, if the remainder be to A, for life, or in tail, remainder to B, in fee, the tenant for life or years, shall have aid of both ; for both remainders begin together, and depend on one estate ; but if the remainder in fee or in tail, be to the lessee, he shall not have aid of himself, but of the other remainders only : so, one parcener of another, if they claim by descent, and this after partition in law, or by construction, as well as on partition in deed ; otherwise, one cannot have in value *pro rata*, if he loses in the action ; and if the deft. have aid of one, and he dies, he shall have aid of his heir. If lessee for life, or years, pray aid, the lessor may join without process.

Rast. 27, a.

§ 4. *Counter plea*. In praying aid, there is the plea, in which the plt. says, the deft. aid of the said A, ought not to have ; because the said A did not demise to the deft., the tenements &c., as he alleges ; and this he prays &c. In 2 Leo. 52, it is said, that if this plea be found for the plt., he has final judgment. Perhaps on the ground, aid prayer is a dilatory plea ; and when the issue is tried by jury, the judgment is final, on the principles before stated ; the delay and trouble of a trial in abatement.

Rast. En. 27.  
—2 Bos. & P.  
384, 386.—2  
Saund. 45, c.  
d, Williams'  
Notes.

§ 5. So, tenant for life prayed aid of him in remainder, and the plt. counterpleaded, and said the deft. ought not to pray aid of him, because he had nothing in the remainder ; the deft. rejoined, and said, he held the lands for his life, the remainder thereof, after his death to the said —, and his heirs &c. ; *hoc ponit &c.*

#### ART. 4. *Parol demurrer*.

3 Bl. Com.  
300.—6 Co.  
4.—It was  
unknown to  
the civil law.  
—Not allow-  
ed in Vir-  
ginia.

§ 1. This may be by the rules of law in many real actions, brought by or against a minor, under twenty-one years of age ; either party may suggest the nonage of the infant, and pray the proceedings may be stayed, or deferred until he be of full age. This plea is but little used in the United States, as the courts usually appoint some person to assist the minor in pleading and in managing his action, and delay is often prejudicial to him. This branch in pleadings has been already in part considered, in Ch. 124, a. 3, in connexion with voucher and counter-pleas thereto, and but little need be added here.

3 P. W. 365,  
Chaplin v.  
Chaplin.

§ 2. If lands in fee descend on an infant, the parol shall demur in equity, as well as in law ; but where a lease is made to a man and his heirs during three lives, the heir does not take by descent, but as special occupant ; and the parol shall not demur ; nor shall it in a writ of entry sur disseizin by the heir of the disseizee.

St. West. 1,  
14.—2 Ins.  
258.

§ 3. But if an infant have the reversion, he shall have his age, if prayed in aid, by tenant for life; but not if sued in an action for his own wrong; nor in *estrepment* for waste; for it is in nature of trespass; nor in a writ of entry *sur disseizin*, against the heir of the disseizor.

§ 4. *Non sum informatus*. The deft's. attorney pleads, in some cases, that he is not informed by the deft. of any answer for him in the complaint &c. to be given. This plea is very rarely, if ever, put in practice.

ART. 5. *Cognizance claimed*. This is where a certain court has cognizance of a matter, and the same is drawn into another court. The judge of such certain court may put in such claim of cognizance; and it must be claimed before any imparlance; for that is a submission to the jurisdiction of the court in which the suit is brought. This article is of considerable importance in England, where there are many courts claiming the cognizance, and often profitable cognizance of causes, under different ancient establishments; but in the United States, in which the courts are generally modern establishments, under the legislatures, and the distinctions of jurisdictions are well understood, and usually, a court derives no emolument by claiming cognizance of causes, but very few claims of this sort have ever existed; nor is it recollected, that it has been the practice of any court in the United States, having the proper cognizance of a cause, to claim it of its own accord; but when a suit, or process has been brought in a court not having the proper jurisdiction of it, the practice has been for the party thinking so, and objecting, to plead to the jurisdiction, in the manner already stated; and to remove the cause in this manner; that is, by defeating the action and driving the plt. into the proper court, or by removing the action by plea or petition, as is provided for by several statutes.

ART. 6. Tender and bringing money into court.

§ 1. This is a very important branch in pleadings, and involves in it many nice distinctions; but need not here be pursued much further, as it has already been largely considered, in Ch. 144, in its natural connexion with pleas of performance, or of tender of performance; but more especially in Ch. 170, a. 1, to 15, in its natural connexion with pleadings in the action of debt; only a few cases will be added in this article, found or decided since Ch. 170 was written mainly.

§ 2. When a tender is pleaded, the money must be paid into court, or the plt. may sign judgment; but this must be understood to be the rule in cases in which the tender does

CH. 177.  
Art. 6.

1 Com. D.  
584.—Co. L.  
380.—Inst.  
328.—2 Inst.  
257.  
3 Inst. Cl.  
230.  
3 Bl. Com.  
300, 301.

1 Stra. 638,  
Pether v.  
Shelton.

CH. 177. not discharge the debt or duty ; as when that is discharged there is an end of the case.

Art. 6.

§ 3. In debt on a bond, the deft. cannot plead *non est factum*, and a tender as to part, where there is but one entire contract ; for tender implies there was a contract.

6 D. & F. 97.  
Jenkins v.  
Edward.

§ 4. In debt on a bond with a penalty, a tender is no bar to the action ; but quære if according to the condition. 2 Johns. R. 24, Manney v. Harris.

8 Johns. R.  
474, Slinger-  
land v.

Morse, (Root,  
448.) the  
court cited, 3  
D. & F. 683.  
—10 East,  
101.—5

Tyng, 67.—  
Cro. El. 48,  
&c —Co. L.  
257, a —9  
Co. 79, a.

§ 5. A, distrained B's horses and household goods, for rent. C promised to deliver the goods to A, in six days, or pay \$450. and the goods were left in C's possession. A, demanded the goods within the six days, but did not appoint any place at which they were to be delivered ; and immediately after, and within the six days, went with C to B's house, where the goods were, and C then tendered the goods to A ; he said he was not ready to receive them ; but if C would carry them to D, A would receive them ; but C refused to do this. A brought *assumpsit* against C. Held, that A's reply to C's offer to deliver the goods to A, at B's house, dispensed with any further tender or delivery on C's part ; especially as the articles were bulky and numerous. A must resort to C, as his bailee of the goods. A acquired a property by distraining.

20 Ed. IV. 1.

§ 6. There is a difference in regard to tender, between things *portable* and things *ponderous*. If no place be appointed for performance or payment, a tender is good to the person that is to receive ; and it is a good bar to an action on the contract ; and the plt. must resort to the person possessing the goods, who will be viewed as holding them as the plt's. bailee, and at his risk. The delivery was *collateral* to the obligation.

5 Johns. R.  
119, Newton  
v. Galbraith.

§ 7. The deft. gave his promissory note to the plt. payable in produce, to be delivered at the deft's. house on a day named. In *assumpsit* on this note, the deft. pleaded payment ; and proved he, on the day, had hay in his barn, ready to be delivered to the plt. ; but did not shew the quantity or value. Held, not to be evidence of a tender or payment.

See Ch. 170,  
a. 14, s. 10.

§ 8. The Pennsylvania act of January 29, 1777, declared that a tender &c. ; but a tender of bills emitted after January 29, 1777, had only the effect of a tender at common law ; that is, only to suspend the interest after the tender and refusal.

2 Dall. 190,  
Sheredine v.  
Gaul.

§ 9. In legal strictness, a mere offer to pay is no tender, nor is the deft. entitled to avail himself of a tender, unless he pleads it, and brings the money into court.

§ 10. The deft. gave a bond for £40, payable by £5 a year; allowed to bring money into court in an action upon it; 2 Stra. 814, *Bridges v. Williamson*. CH. 177. Art. 6.

§ 11. In a declaration, containing a count on a policy of insurance, also the money counts, the deft. paid money into court, generally, on it. The plt., by his conduct, before the trial, induced the deft. to believe the only point to be tried, was a question of fraud, and the deft. prepared accordingly his evidence; and the court would not allow him to object to the receipt of that evidence at the trial, on the ground the deft. had admitted the contract, by paying money into court: this shews how material it is to conduct fairly. 3 Bos. & P. 556, *Muller v. Hartshorn*; cited 1 Phil. Evid. 150.

§ 12. If the declaration be on *contract*, and money is paid into court, it is an admission of it in every transaction, which is capable of being turned into a contract by the assent of the parties. Hence, where a deft. possessed himself of the plt.'s goods, and sold a part, and kept the rest in specie, paid money into court generally, on a declaration, containing a count for goods sold and delivered: held, the deft. admitted the transaction to have been converted into a contract; and that the plt. was entitled to recover the value of all the goods, on this count, for goods sold and delivered. The money was paid in, as well on that count as the others, and so on the general principle, admitted the contract laid in it; and see s. 13, and 1 Phil. Evid. 150. 2 Bos. & P. 550, *Bennett v. Francis*.

§ 13. Paying money into court on a count, on a special contract, admits it, and the inquiry is limited to the amount of damages sustained by the breach of it. Hence, if the plt. declare, as on the deft.'s. general undertaking to carry goods for hire, on which he pays £5 into court, he cannot be admitted to prove the contract was, that he should not be liable for goods lost to a greater value than £5, unless entered and paid for accordingly; yet, if no money had been paid into court, the plt., on such evidence, must have been nonsuited. *Peake's L. E.* 202, 203; see Ch. 175, art. 6, sect. 33, 34. 2 East, 123, *Yates v. Willan*.—5 Burr. 2640.—2 D. & E. 275.—1 D. & E. 464.—4 D. & E. 579.—1 Cam. N. P. 134, 557.

§ 14. If money be paid into court, it only admits a legal demand, if one in the declaration to which it may apply, though there be an illegal one also. In such case, money so paid into court, cannot be applied to an illegal account, as on such account no payment is intended. 1 Bos. & P. 264, *Ribbans v. Crickett*.—2 H. Bl. 374.—2 East, 134.

§ 15. The court gave leave to withdraw the general issue, in order to bring money into court, and then to replead the same issue: this, for the promotion of justice, is within the general discretion of the court, and is our practice. 2 Stra. 1271, *Tarleton v. Wragg*.

CH. 177. § 16. An action was brought against three defts.; one was  
 Art. 7. outlawed, judgment against another by default, and the court  
 refused to allow the third to pay money into court; 2 W.  
 Bl. 1029, *Kaye v. Panchiman*.

1 H. Bl. 299, § 17. In an action against a carrier, who had given notice  
 Hutton & al. he would not be liable beyond £20, but on certain condi-  
 v. Bolton. tions; he was allowed to pay £20 into court.

1 H. Bl. 24, § 18. Plt. in replevin was allowed to pay into court the  
 Vernon v. rent for which the deft. avowed.  
 Wynne.

2 Stra. 796, § 19. And if an executor sue, money may be brought into  
 Crutchfield court.  
 v. Scott.

3 D. & E. § 20. If the court has reason to believe a *qui tam* action  
 137, Parker is prosecuted, merely for the issue money; on motion, the  
 q. t. v. Mac- court will allow it to be paid into court by the deft., to abide  
 farlan. the event of the suit.

2 D. & E. 645, § 21. If a party pay money into court by mistake, he is  
 Malcolm v. allowed but in one case, and that is, where it is paid in by  
 Fullerton. rule of court.

2 Bos. & P. § 22. And if the deft. pay money into court by mistake,  
 392, Vaugh- the court will not order it restored to him, except, perhaps,  
 an v. Barnes. in cases of fraud.

1 Johns. R. § 23. After the deft. pleaded, the court granted him leave  
 149, Dunlap to pay money into court, paying costs to the time, but not  
 v. Com. Ins. specifically, as a premium on a policy of insurance, on which  
 Company. the action was brought.

7 Johns. R. § 24. Held, that payment of money into court admits the  
 315, Johnst- cause of action, as it is stated in the plt's. declaration. This  
 on v. Colum- is the general principle now clearly settled in many cases :  
 bian Ins. Co. The true inference, for when the deft. pays money into court  
 -1 Taun. R. on the plt's. declaration, he admits he owes the plt. money  
 419. on the ground of it; and if that be contract, he admits all  
 the fair construction of it; or if tort, he admits the tort in  
 substance, as charged in the declaration. Bringing money  
 into court admits the plt's. character in which he sues; also  
 1 Phil. Evid. admits the action is in the proper court; cites 5 Esp. N. P.,  
 150. Miller v. Williams.

1 Phil. Evid. § 25. After paying money into court, the deft. may avail  
 152. himself of his infancy.

Johns. R. § 26. In case, on a policy, deft. pays premium into court,  
 192, 204, the plt. takes out the money, informing he means to go for  
 Sleght v. a total loss. Held, he may do it. Paying money into court  
 Rhinelander must be proved by producing the rule of court.  
 & al.—2

Taun. 267. ART. 7. *Protestandoes*. § 1. These are often used in vari-  
 3 Bl. Com. ous parts of pleadings, and are often used with but very little  
 311.—5 Com. precision; the general use is to prevent duplicity in plead-  
 D. 459.—2 ing, and especially to prevent a conclusion being made  
 Saund. 103.  
 —3 Ins. Cl. 307, 350.—Flow. 276.—1 Inst. Cl. 124.

against the party taking it, in another action. A *protestando* always precedes the plea, in this manner; and the said D. *protesting*, the said tenements were not included in the fine levied, as aforesaid, &c. &c., for plea says, &c. Several purposes are ascribed to a *protestando* in the books. It is stated to be often used to avoid an implied admission of a fact, which cannot, with propriety or safety, be positively affirmed or denied. *It is an exclusion of a conclusion.*

CH. 177.  
Art. 7.

§ 2. *Protesting* the plt. is a villain; for plea, no demand; by the *protestando*, the future vassalage of the plt. was saved to the deft. in case the issue was found in favour of the deft.

3 Bl. Com.  
311, 312.

§ 3. Protest, that A died seized; plea, that B died seized, and the matter of this *protest* the plt. cannot traverse.

3 Inst. Cl.  
305, 306.

§ 4. When one is to answer to two matters, but can plead only to one, for *duplicity*, he may take a *protest* to one, and plead to the other, and take issue; and he is not concluded by any of the rest of the matter he has by *protestation* denied, but he may afterwards take issue thereon.

5 Mod. 136.  
Finch's Law,  
359, 366.—3  
Inst. Cl. 308.

It is of *two sorts*: 1. When a man pleads any thing he dare not directly affirm, or cannot plead for fear of making his plea double; as if to make title to land, the deft. ought to plead divers descents from several persons, but dare not affirm they were all seized at the time of their death; and if he could so plead, it would make his plea double, to allege *two descents* when *one* descent would be a sufficient bar; then the deft. ought to plead and allege the matter, interlacing the word "*protesting*;" thus protesting that such a one died seized, &c., and this the adverse party cannot traverse: the second sort is, when one is to answer two matters; yet, by law, can only plead to one of them; then he may say, *protesting, or not acknowledging* such part of the matter to be true; and adds for plea, &c.: in this way "he is not concluded by any of the rest of the matter which he has, by protestation, so denied, but may afterwards take issue upon it." A *protestando* requires no answer.

2 Saund.  
103, in Hol-  
dipp v. Ot-  
way; Wil-  
liams' notes.  
—7 D. & E.  
447, Black-  
more v. Flem-  
ing.—9 East,  
298, 304,  
Philip v. Ba-  
con.—1 Phil.  
Evid. 172.—  
9 East, 157.

§ 5. But in some books it is said that the effectual matter of the bar, or things issuable or traversable, may not be taken by *protestando*. A protest repugnant to itself is void. The party may protest he has performed his covenant; also, that the other party did not perform his: that the information is insufficient in law: that he has fully administered, and for plea, that he did not sell or waste: that he has kept his warranty, and that H. had no right: for plea, did not eject; protest, not any thing true; and it is idle to protest as to a thing that is traversed by the plea.

Law's Pl.  
143.—3 Ins.  
Cl. 306, 307,  
308, 309.

Co. Ent. 43.

Flow. 271.

CH. 177. § 6. So, the deft. may protest, the goods charged were not  
 Art. 7. so many, and of so much value. Protest does not avail, for instance, in the villain's case above stated, if the issue be found for him; but it does as to the value of the land, in an action on the warranty, though his plea be found against him, for he could not plead the value; but generally a protest cannot be taken of a matter *issuable*, nor avail the party taking it, when the issue is found against him; but a few special cases are exceptions.

§ 7. This was an action of account against Saunders, as surviving bailiff. Plea, &c. Replication, that the goods were intrusted with the deceased partner, by the deft., (they being cofactors,) *without the direction, consent, or privity of the plt.* Rejoinder, *protesting* that the said goods were intrusted by the deft. to the deceased alone, by *the plt's. consent*. The court held, this *protestando* was bad; for the deft., by his plea before the auditors, admitted and relied on the *plt's. consent as material*; therefore, when the plt. tendered, in his replication, an issue on *the consent, matter material and issuable*, the deft. could not take *matter issuable by protest*, or if he do, it cannot avail him, except in a few cases: but where the issue is found for the party, his *protestando* avails him; but if against him, there is this distinction: 1. If the matter on which the protest is taken, be not *issuable* or *pleadable*, it avails him; as if an infant sue his guardian, and appears by attorney; protest, *the plt. is a minor*, avails the deft., though the issue be found against him: 2. If the matter on which the protest is taken be *issuable*, or *that which may be pleaded*, the protest avails not; as if the villain sued his lord, and the lord protest *the plt. is his villain*, and *plead his other matter in bar*, and issue is joined; now, if the issue be found for the lord, the plt. is a villain still; but if against the lord, and for the villain, he is *free*, for the lord might have pleaded, (instead of protesting,) that the plt. was his villain, and issue taken thereon.

§ 8. A *protestando*, inconsistent with the plea, or itself, is bad; as where to an appeal of *mayhem*, the deft. protested that if the plt. had any hurt or *mayhem*, it was from his own assault, and pleaded he *was not maimed*. This protestation is repugnant to the plea. So, an *idle* or *superfluous protestando* is bad; as in an action by the executor of A, the deft. protests A did not make a will; also, that he did not make the plt. executor: second is idle, for if he made no will, he did not make the plt. executor. But held, that a *superfluous* or *repugnant* protestation, does not vitiate the plea, though shewn for cause of demurrer; "for the intent of the *protestation* is, that the party may not be concluded in *another action*;" nor

Ras. En. 636.  
 —4 Bac. Abr.  
 55.—Co. L.  
 126.—5 Com.  
 D. 460.—  
 Ch. 120, a.  
 5, s. 2.—Ch.  
 124, a. 2, s.  
 1.—Ch. 226,  
 a. 6, s. 3.  
 3 Wils. 94,  
 Godfrey v.  
 Saunders.

Plow. 676.—  
 Finch, 359,  
 360.—3 Wils.  
 110, 111.

Plow. 276,  
 Graysbrook  
 v. Fox; cit-  
 ed 2 Saund.  
 103, b. c.  
 Williams'  
 notes; cites  
 Keilw. 95.—  
 Cro. El. 815.  
 —Co. L. 126.  
 —Plow. 1, 2.

can that which is *the ground of the action*, be taken by protestation, as *it may be put in issue*, as in the villain's case above; and as, if the plt. be A's executor; may be put in issue, and defeat the suit.

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ART. 8. *Estoppels*.

§ 1. This is an important branch in pleadings, already in part considered, Ch. 160, a. 1, English cases embraced in thirty-four rules; a. 2, American cases. *Estoppels* are matters in pleadings very much scattered throughout the books; and may here be further pursued.

See Ch. 160.

The manner of pleading an *estoppel*, is in substance thus; for instance, in case of variance, between the complaint and declaration after *imparlance*, and the plt. says the deft. ought not to be admitted to plead *variance* between the complaint and declaration, because the plt. says he, at such a court, declared against the deft. on the complaint, to which declaration, the deft. in that court prayed leave to imparl, &c. and had it, as appears by the record, &c.; *hoc paratus*; wherefore he prays judgment if the deft. ought to be admitted to plead that *plea of variance*, &c.; or in another form, he prays judgment that the deft. to the plt's. writ may further answer; another case prays judgment as well if the deft. ought to be admitted against that record, to say, the said H. before the time of suing out the original writ, in the replication mentioned, died, as for his damages occasioned by the non-performance of the separate promise, to be adjudged to him. The deft. says he ought not to be precluded his plea of variance, &c. because his *imparlance* was with reserving all exceptions to the complaint, &c. and traverses, that there is any record but of a special *imparlance*, &c.

7 Inst. Cl.  
152.—Clif.  
20.

§ 2. The courts keep a strict hand upon *estoppels*, as their tendency is to preclude the truth, and may be demurred to. See Ch. 160; Ch. 91; and Index, *Estoppels*.

§ 3. The deft. was arrested by a wrong addition, and put in bail, thus, "A B, gent. who was arrested by the name of A B, clerk." Held, he was not estopped to plead, in abatement of the original action, that he was sued by the wrong addition; but estopped if he put in bail by the name in the writ. Lofft, 82.

Willis, 461,  
Smithson v.  
Smith.

A, having no interest or estate in certain lands, demised them by indenture, and afterwards purchased them. Held, he was estopped to say he had no interest in them, when he bought them; but if A have an interest in a part of the land, his lease will operate to pass an interest in that part, but by *estoppel* in the rest in which he has no interest: so, having an interest in a part does not exclude the *estoppel* as to the residue.

1 Ld. Raym.  
729, Hermit-  
age v. Tom-  
kins.—1  
Salk. 275,  
Holman v.  
Hoare.

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2 Bos. & P.  
299, Hosier  
v. Searle.

§ 4. Certain indentures were made between the plt. and R. G.; and the deft. gave a bond to the plt., conditioned for the performance by R. G. of all the covenants in the indenture made, or expressed to be made; both the same date. Plea, that before the bond was executed, it was agreed the plt. should grant to R. G. a lease under certain covenants, and for the performance of them, the deft. should give a bond as surety; that he did give it accordingly, on which the action is brought; but the indenture mentioned in the condition of it, is the lease so agreed upon, and no other; but this lease was never executed. Held, on demurrer, that the deft. was *estopped* by the condition of his bond, from pleading this matter.

3 East, 346,  
Outram v.  
Morewood.

§ 5. If a verdict be found on any fact or title distinctly put in issue, in an action of trespass, this verdict may be pleaded as an *estoppel* in another action between the same parties or their privies, in respect of the same fact or title.

3 Johns. Ca.  
101, Jackson  
v. Brincker-  
hoof.

§ 6. A conveyance of land, at common law, by a person against whom there is an *adverse* possession at the time of the conveyance to a third person, is void; but the grantee's title is not thereby divested or gone; nor will such a conveyance inure, by way of *estoppel*, for the benefit of the deft. in possession; nor can a stranger avail himself of an *estoppel* by a *mere writing*, or a matter in pais; nor can any person be technically *estopped*, by a conveyance under the statute of uses.

1 D. & E. 701,  
Doe v. Burt.  
—See also, 3  
D. & E. 609.—  
6 Ves. J. 397.  
—2 Johns. R.  
531.—1  
Johns. R. 192.

§ 7. A lease of the premises in W., late in the occupation of A, particularly describing them, part of which was a yard. Held, it did not pass a cellar situated under that yard in B's occupation, another tenant of the lessor; and he was not *estopped* by his deed, to recover the cellar, and to shew it was not intended to be leased in the said lease; and whether parcel or not of the thing demised, is always a matter of evidence. Parol evidence admitted, &c.

Willes, 12,  
Shelly v.  
Wright.

§ 8. Where the plt. replies, the deft. is *estopped* to plead his plea, he may demand judgment generally.

#### ART. 9. *Averments.*

Ch. 180, a. 1.  
—3 Inst. Cl.  
310.

§ 1. *Averments* are numerous and material in pleadings; and in almost every part of them. A general averment is the conclusion of every plea in bar, &c. containing matter affirmed; "*and this he is ready to verify.*"

Mildmay's  
case, 1 Co.  
176, &c.

Particular averments are of particular facts; as where the life of tenant for life, or in tail, the age of a person, is averred; also that places, sums of money, and persons named, are one and the same. The use of an averment is to ascertain that to the court, which is generally or doubtfully alleged, so that the court may not be perplexed of

whom, or what it ought to be understood; and a man shall never be estopped from making such averment to ascertain the intent of the parties, if it be not utterly inconsistent with the deed; therefore if there be any uncertainty in the consideration of a deed, or in the thing granted, or in the person to whom granted, an averment is allowed to make it certain; as if there be an express consideration mentioned in a deed, as of money, another consideration may be averred, so it be not contrary to the deed, as the consideration of marriage and jointure; but no averment lies against a record; nor can a party aver a thing directly contrary to the condition of a bond; but may aver other considerations not expressed.

§ 2. If the deft. justify the trespass, &c. at the same day and place as stated in the declaration, he need not aver it is the same trespass.

§ 3. It was held in this case, that where a good consideration is expressed, a particular consideration, as blood, money, &c. may be averred. The consideration of £70 was expressed, and held, another consideration, as blood, &c. might be averred. One may explain his deed, but cannot aver any thing against it. Love and affection expressed, covenantee may say he is a relation. 2 Stra. 934, *Goodtitle v. Petto*.

§ 4. See many *averments*, and rules and cases as to them, *American Precedents*, p. 75 to 82, Ch. 11. Also *Notices and Requests*; id.

Further rules and cases of averments of *notice*, *request*, and *demand*. It is a rule in pleading, that whenever an interest is to be determined, a demand must be made and averred in pleading, though the provision of the parties be, that if the rent, &c. be not paid in such a time, then the lease, &c. to be void.

§ 5. So, if a thing be to be done on request, within six months, or money to be paid, if the request be not made in that time, (and so averred,) it is a dispensation of that part of the condition; and then the law discharges the other part.

§ 6. If the plt. declare in *assumpsit*, against a town, for maintaining its pauper, and omit to aver notice, this is a defect; but is cured by verdict. 4 Burr. 2018; 1 Mod. 169; 2 Burr. 899; 2 Show. 245; Dougl. 679, (654;) 1 D. & E. 141, *Speares v. Parker*.

§ 7. If referees award a sum of money to be paid on demand, a special request must be made and averred; but if A be bound to B, on condition C shall enfeoff D, C has

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3 Inst. Cl. 311, 112, &c. — 1 Phil. Ev. 168. — What is a material averment, or not? Not, if the whole may be struck out, and leave a right of action.

3 Inst. Cl. 316.

1 Co. 176, &c. *Mildmay's case*.

2 Mod. 264, *Steward, ex'r. v. Allen*. — Ch. 140, a. 6. 2 Mod. 203.

*Butler v. Cornwall*, 2 Wils. 280.

*Cro. Jam. 639, Waters v. Bridges*. — Co. Lit. 203.

CH. 177. during life to do it ; and his tender will save the bond ; for  
 Art. 9. C shall be intended in B's influence.

§ 8. When a penalty is incurred for the non-payment of  
 rent, even on a day named, there must be an *actual* demand  
 of the rent made, and averred, if sued for, or the penalty is  
 not incurred.

§ 9. In this case, it was held, that if the deft. be bound to  
 deliver the plt. a bond or goods, or to do other *transitory*  
*act in its nature*, though a place be named, and no time is  
 mentioned, the deft. is bound to deliver presently ; that is, in  
 a *reasonable time*, and *without request* ; so none need be aver-  
 red in pleading in such a case.

§ 10. But if A be bound to *reconvey land* to the *grantor*,  
 or to *him* and a *stranger*, A has during life to do it, unless  
 hastened by request ; but if to convey to a *stranger*, he must  
 do it in convenient time ; as he undertakes to do an act to a  
 stranger.

§ 11. According to this case of Boothey, the obligor has  
 during life to perform, but in one case, where no time is  
 mentioned for performance ; and that is where he is to do  
 an act *local in its nature*, and the *concurrence of the obligee is*  
*necessary to the doing of the act* ; and in this case the *obli-*  
*gee may*, by request, hasten the doing of the act, except  
 when he has no concern in it ; for the act cannot be done,  
 unless the *parties meet at the place*.

§ 12. Where a request is to do a *collateral* thing, it must  
 be averred. 2 Ld. Ray. 1094 ; Ch. 140, a. 6.

§ 13. That which will come most properly on the other  
 side, need not be averred in a declaration or plea ; nor is  
 any averment necessary in a declaration, where there are  
 mutual remedies.

§ 14. An averment is vain, where the law judges the  
 contrary. *Negative* pleas ought not to be averred ; for a  
 negative plea cannot be proved ; but *affirmative* pleas must be  
 averred.

§ 15. *Testatum existet* is no *averment*, but only *recital*.  
*What may or may not be averred*.

§ 16. Some presumptions of law are so violent, though  
 false, a man cannot aver against them ; as the law presumes  
 every layman liable to tithes, and will not admit a prescrip-  
 tion to the contrary ; but there is a general and settled rule,  
 that a presumption stands only till the contrary is proved ;  
 now it is hardly conceivable that a *presumption* is so strong,  
 as not in any event, to be outweighed by positive and clear  
 proof.

If an annuity be granted for counsel and aid to be had,  
 and it is not said in what matter, yet it may be averred, that

he who is to give it is a physician or a lawyer, and it was granted for his aid, and counsel in his profession: so, if the grantee be learned in two sciences, it may be averred, the grant was for one in certain. CH. 177.  
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§ 17. If a consideration be expressed in a deed, there can be no *averment*, allowed that there was none (but by way of fraud) for that would be against the deed; but if no consideration be mentioned in the deed, or only divers good causes and considerations, there, an averment of a good consideration given, shall be received; for this is an averment that may stand with the deed, and the deed estops nothing consistent with it. 5 Wood's  
Con. 463.—  
Gil. Cases,  
287, 388.

§ 18. So, in a common recovery a use may be averred; 4 Co. 1 to 5, where an estate, on condition, may be averred to be a *jointure*, before stated. 5 Co. 37,  
Vernon's  
case.

What executions may be averred, though not returned; see Return.

§ 19. If one named in an indenture, do not seal it, he must be excluded by an averment; otherwise intended, he executed it. 2 Stra. 1146,  
Vernon & al.  
v. Jeferys.

§ 20. If in a recovery there be a deed to lead the uses, and *parol* averment, that the recovery was had to other uses, cannot be admitted; but such an averment may be made against the use in a subsequent deed or declaration, and the uses first mentioned, can, in pleading, only be confessed and avoided, and the uses in the after deed may be traversed. 2 Salk. 676,  
Tregany v.  
Fletcher.

§ 21. There can be no averment against the test of a writ, when it is in support of justice. 3 Salk. 53,  
Mason v.  
March.

§ 22. This question as to what may or may not be averred; as also, the question, what ought or ought not to be averred, occasionally occur in all parts of pleadings, and have already been examined under different heads; the first, largely in another form, that is, under the head of Evidence, what may or may not be proved, especially by *parol* evidence; for what may be properly averred, may be proved; and what may be properly proved, may and ought usually to be averred; so numerous are the cases in what the plt., to ground his action, must aver he has performed some condition or matter, on his part; or has tendered performance; or has been ready to perform: see Rules and Cases in Declarations, *Assumpsit*, Considerations, Covenants, &c. So, many are the cases in what the plt., to sustain his action, must aver a demand, or a request made on the deft., specially; see the same heads: also, Notice and Requests, next articles. Also, many are the cases in which the plt., to ground his action, and recover for doing a thing, as conveying property, performing services, &c., he must aver he did

CH. 177. the thing at *the deft's. request*; doing it at *his request* being  
 Art. 9. the consideration of his promise often, as in scores of cases  
 in *assumpsit*; see *Assumpsit*, said rules and cases and con-  
 siderations.

Jon. 328.—5 § 23. A devises that if his goods be not sufficient to pay  
 Com.D. 346. his debts, his land shall be sold. He who avows under the  
 vendee, must aver precisely that the personal estate was not  
 sufficient, for this insufficiency of the personal estate, is a  
 condition precedent to selling the land, and so must be aver-  
 red and proved.

4 Mass. R. § 24. *Condition precedent in the sale of goods, though deliver-*  
 405, 407, *ed*; as if A contract to sell certain goods to B, on a credit,  
 Hussey & al. with the condition, B shall find a surety for the price; and  
 v. Thornton A deliver the goods without the surety being furnished, but  
 & al. declares he should not consider them as sold until the secu-  
 rity should be given. Held, the property remained in A;  
 the surety is a condition *precedent*, to change the property,  
 and the vendee's agent takes them on these terms; but if the  
 vendee had sold them while in their possession, *bona fide*,  
 and without notice to the buyer, his title had been good: so,  
 if their real creditor had attached them: so, a sale of goods  
 as well as of lands may be void as to the immediate vendee,  
 but valid as to his vendees, *bona fide*, and without notice.

7 Co. 10.—5 § 25. If I promise 20s. to A, for his going to Rome with  
 Com.D. 347. me, he must *aver his going*, &c., for this is a condition pre-  
 cedent. So, for services for a year, \$100 to be paid, the  
 performance of them is a like condition, and must be aver-  
 red. But the words, *paying and performing, in a lease*, make  
 2 Mod. 35, a *covenant* and not a *condition precedent*, the performance  
 91, 93. whereof must be averred.

12 Mod. 406. § 26. If one be bound to save another harmless against a  
*particular thing*, he must *aver*, and shew *how* he has done it:  
 but if to save harmless *generally*, not damnified will do. But  
*how* is *form*, after verdict, and well enough, though not shewn  
*how*; for if one states, and proves he has done a business or  
 5 Com. D. act, this is the *substance*, and the particular mode and manner  
 352. of doing it is the *form*.

2 Burr. 832, § 27. *What is a sufficient averment of a fact.* "Being sur-  
 834, Rex v. veyors of the highways," is a *sufficient averment* they are  
 Boyall. surveyors; as in an *indictment*, it was alleged that A and B *being*  
 surveyors, &c., appointed a day for working there, and noti-  
 fied the deft., &c. He objected that A and B were not suf-  
 ficiently alleged or averred *to be surveyors*, &c.: it is only  
 that they *being* surveyors. But the court held, it was a suf-  
 ficient averment; and cited 2 Mod. Reports, 128, Rex v.  
 Moore; when it was held *positive* enough in an *indictment* to  
 allege "*being* above such an age."

§ 28. So, held, that pleading, one Saunders *having been* legally possessed, *as* tenant at will to B, is a sufficient averment that A was tenant at will, &c., though the whole merits of the plea depended on A's being tenant at will, &c.; "for pleas must be construed according to a common intent; and a man must strain indeed, to say this plea does not plainly intend that G. Saunders was tenant at will." The word *as* tenant at will affords no objection.

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Willes, 131,  
Eaton v.  
Southby.

§ 29. In this action the declaration in trespass for an assault and battery. Held, good and well averred, though it was, *for that whereas*, &c. by way of recital. This was a case fully considered by the whole court; and in which a contrary decision, on this point, in 1 Mass. R. was overruled.

2 Mass. R.  
358, Coffin v.  
Coffin.

§ 30. When a lease is made by tenant *for life*, any one claiming under it, ought to aver he is alive; but quere, if by tenant in tail.

1 Saun. 230.

§ 31. *General estates* in fee simple may be averred generally; but the commencement of *estates in tail*, and other particular estates, must be averred and shewn, unless where alleged only by way of *inducement*: so, the life of tenant in tail, or for life, must be averred.

Thursby v.  
Plant, Co.  
Lit. 305.—2  
Esp. 169.

§ 32. *How the plt. avers performance.* Case for not delivering malt, the deft. had engaged to deliver on request, at a certain price. Held, sufficient for the plt. in his declaration, to aver such request; and that he was ready to receive the malt, and to pay for it according to the terms of the sale, but the deft. refused to deliver it, without averring any actual tender of the price.

1 East, 203,  
Rawson & al.  
v. Johnson.—  
Same, 2 Bos.  
& P. 447,  
Waterhouse  
v. Skinner.

*What is necessarily implied, need not be averred. Nor what may be fairly intended; and either may be traversed; for what is necessarily implied or intended, is as if expressed in pleading.*

Amer. Prec.  
ch. 7.—4  
Bac. 81, 100.

§ 33. Not any parts in pleadings are more material to be attended to than these; as the question so repeatedly arises as to what, from matters expressly stated or averred, may be *necessarily implied, fairly intended, or reasonably presumed*; but mere *supposal* is not traversable; but "whatever is *necessarily understood, intended, or implied, is traversable* as much as if it were expressly stated or averred." As when one pleads *he is seized in fee* of such a close, it is necessarily intended *sole seized*, and may be traversed as a *sole seizin*, as much as if so averred.

2 Salk. 629,  
Gilbert v.  
Parker.—  
4 Bac. 81.

§ 34. So, a husband seized in right of his wife, avows for rent in arrear; this necessarily implies she is alive; and her being alive may be denied, as it might be if averred.

2 Lev. 88.—  
5 Com. D.  
362.

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Liford's  
case, 11 Co.  
52, &c.1 Salk. 325.—  
Lutw. 1172.Stra. 394,  
Carbonel v.  
Davis.Cro. El. 819,  
Basset v.  
Maynard.—  
9 Co. 51, B.—  
5 Com. D.  
515.Stra. 512,  
Atkinson v.  
Coatsworth.Taylor v.  
Deblois.Cro. El. 742,  
759, Moore &  
al. v. Onslow.Co. L. 175.—  
3 Bac. 211.5 Com. D.  
363.—P.  
Com. 31.  
Hob. 78.—1  
Lev. 18.

§ 35. If I grant trees in my land to A, he has an implied power to come with carts and teams, and take them away; and in pleading, it may be averred, or stated by legal construction, as much, as if expressly given in the grant.

§ 36. The plea was that *A, was siezed*; that *he* died seized; it was intended, *A* died seized, though not averred *who* died seized.

§ 37. This was *assumpsit* on a note, stated to be made November 2, to pay 31st. December *next*; was intended next after the date of the note, not next after the action brought.

§ 38. If a jury, by their verdict, find a *bargain and sale of goods*, a consideration shall be intended, and may be averred in pleading, in giving the contract a legal construction; and so if the jury find a retainer of a deputy, it shall be intended by deed, and may be so stated or averred, as the true construction. 1 L. Ray. 111; consideration presumed.

So, if they find the lessee by *indenture* made a covenant to pay the rent, it shall be intended he sealed; and in pleading, it may be so averred, for one to make his deed, is in legal construction to seal it.

So, to state, or aver one made his note of hand, imports he signed it; and in a declaration in such case it is a good averment.

§ 39. Joint-tenant and tenant in common has partition on the 31 H. VIII. 1. Held, his general writ on the statute is sufficient, if concluding against the form of the statute, without averring or reciting the case specially, so as to bring it within the act: for the framing of the writ is left to the clerks in chancery, and must be according to their form; but a *parcener*, whose writ is at *common law*, and her sister's grantee, whose writ is on the *statute*, cannot join.

§ 40. If one avers what cannot be by law, his averment is of no avail; as if he aver *land* is appurtenant to a *mesuage*, as this cannot be by law. Nor need he aver what appears to the court; nor matter surmised *ex abundanti*; nor matter in defeasance of the action; for this properly comes from the other side.

§ 41. *Averments of pleas.* *Averments of pleas* in contradistinction to concluding to the country, or offering an issue, is a part of averments that deserves the most attention. Hardly any question more frequently arises in pleadings, than the one, whether the party ought to conclude his plea, replication, rejoinder, &c. to the country, or with this averment; to wit, "*and this he is ready to verify*;" or "*et hoc paratus verificare.*" Hundreds of cases have already occurred in this work in which this question has arisen, and in which either the conclusion to the country, or with this averment,

has been adjudged to be the proper conclusion ; and many more such cases will occur in all the stages of pleadings. CH. 177. Art. 9.

On this branch in pleadings nothing more will be attempted here than to lay down a few rules, and to adduce a few cases to explain them.

§ 42.—Rule 1. The first rule is, that where the *whole* plea is denied, the replication ought to conclude to the country.—Rule 2. Where only a *particular fact in the plea is denied*, the replication ought to conclude with an averment.—Rule 3. Where the replication introduces *new* matter it ought also to conclude with an averment ; but to the country if it deny the *substance* of the plea. 1 Burr. 317, 323, Robinson v. Rayley.—Doug1. 60.—2 D. & E. 576.—2 Johns. R. 428.

§ 43. As in trespass. Deft. pleads, *his soil and freehold*. Plt. replies, *his soil and freehold*, and not the deft's. ; replication ought to conclude to the country. 3 Salk. 275.

§ 44. This was debt on a bond conditioned that A should not revoke his will. Plea, that he did not revoke it. Replication, that he made another will, and thereby revoked the first ; *hoc paratus*, &c. ; and held, on demurrer to this replication, it was good ; though an *affirmative* to a *precedent negative* in the plea ; because in this replication *new matter* was suggested, and so it ought to conclude with an averment. 3 Salk. 211, Loder v. Loder.

§ 45. So, to conclude with one when it should be the other, is cause of *special* demurrer ; or want of *hoc paratus*, &c. 4 & 5 of Ann.—Cowp. 577.

§ 46. Where the *absque hoc* comprises the *whole* matter generally, as *absque tali causa*, it may conclude to the country ; but where it only traverses a *particular* matter, as *absque tali warranto*, it ought to be averred. Salk. 4, Haywood v. Davies.

§ 47. This was debt on a bond given to the sheriffs of Middlesex, by Minns, as surety of Jos. Stanhope, one of their bailiffs, conditioned to perform his duties, as serve writs and return them, receive prisoners, &c. pay over monies, exonerate the plts. in certain cases, &c. Deft. pleaded a special plea, stating the indenture in said condition mentioned, and the several covenants in it to be performed. The plea, as to the *negative* covenants, stated, the said *Jos. had not done* ; so in the words of each as to the *affirmative*, that the said Joseph *had performed them generally*. The plts. replied, a writ of *feri facias* issued on a judgment for £400, against one Pigot, at Grove's suit, and was delivered to said bailiff, and he neglected to return it, by reason of which the plts. had to pay, &c. ; and also replied, other such special and *new matter*, and concluded *to the country*. Deft. demurred specially, for this cause, &c. ; and judgment for him ; for when *new matter* is introduced, it is necessary to conclude with an averment, that the opposite party may have an op- Cowp. 575, 578, Sayre & al. v. Minns.

CH. 177.  
Art. 9.

portunity of answering such new matter ; and the court said, it was a rule in pleading, you cannot go to issue on a *general averment of performance* ; for the question ought to be brought to some degree of certainty, and notice given of what is to be agitated at the trial. Here there is a *general averment* ; and no issue is offered by the replication.

This replication averred a *general performance of many matters*, (and concluded to the country ;) it was bad therefore, on this account, as well as because it contained *new matter*.

10 Mod. 243.  
Miles v. Wil-  
liams.

§ 48. Debt on bond, against husband and wife ; her bond *dum sola* ; they pleaded his bankruptcy and discharge, and concluded *hoc paratus*, &c. Special demurrer, for they ought to have concluded to the country, and of this opinion was the court : and his discharge was her's. It may seem at first view that *hoc paratus* in this case was right, as the defts. pleaded the husband's *bankruptcy*, a commission issued, his conformity to the statutes in all points, and his discharge ; but it will be observed, these several facts pleaded, were all connected and essentially tended to *one point*, his discharge, and so her's. Both baron and feme pleaded, as was proper, and if their tender of an issue had involved in it many matters, it would have been no more than is sometimes done in a special plea, nor more than what is usually done in a tender of the general issue ; and issue taken brought all the matters into trial fairly.

1 Wils. 6.  
Tomlin v.  
Burlace.

§ 49. Debt on bond. Plea, *by duress*. Replication, the deft. executed the bond of his own free will, and not for fear of imprisonment. Conclusion to the country held good.

2 Johns. R.  
462, Patcher  
v. Sprague.—  
See 3 Cain.  
160.—2 D.  
& E. 439.—  
Cro. El. 107.

§ 50. In *trespass* the deft. pleaded that the goods taken were seized by an officer, on a warrant, as an absconding debtor's property, (stating the proceedings under the act, and that from him the plt. held the goods by a *fraudulent conveyance*) and that the deft. acted in aid of the officer. Held, a good plea ; for *several dependent facts, making but one defence, may be pleaded together*.

5 Johns. R.  
112, Lytle v.  
Lee & al.

§ 51. Held, where a plea contains matter of *law* and of *fact*, it may properly conclude to the country.

5 Com. D.  
359.

§ 52. It is a general rule in forming a declaration or plea, &c., the party ought to aver every fact, without being informed of which, the court cannot judge whether he has right or not : as in an action on a statute, the plt. must aver every fact necessary to inform the court his case is within it. So, what is made requisite by the purview of a statute, must be averred ; as where a statute makes a feoffment, &c. by *cestuy qui use* of full age, *sane*, at large, &c., good : one who pleads a feoffment by *cestuy qui use*, must aver he was *sane*, of full age, and at large ; for only such a one is authorized by the act, to make a feoffment.

Lutw. 1089.

§ 53. An *averment* need not be in express words : *licet* is a sufficient word : so, *pro eo quod* : so, he demanded *proferendo satisfactionem*, is a good averment of a tender ; 5 Com. D. 361 ; 2 Cro. 383 ; Salk. 686. CH. 177.  
Art. 9.

So, any facts stated are a sufficient averment from which the fact may be inferred, that might be expressly alleged ; as where it is stated the executor paid a debt of the testator and took a term in satisfaction ; as it may be inferred hence, the executor paid *with his own money*, this fact is well averred ; and see Lutw. 1172 ; 1 Lev. 154 ; 2 Lev. 50 ; Stra. 512 ; Cowp. 672 ; 1 Vent. 136 ; 1 Lev. 75.

§ 54. Debt on bond, conditioned to deliver up certain goods, if by law adjudged prize. Plea, the law had not adjudged them prize : this admits they were not delivered up, and so the plt. need not allege that fact in his replication. 2 Ld. Raym.  
891, Grant  
v. Waller.

§ 55. *Hoc paratus*, or *hoc petit* ; as in debt on bond, the deft. pleads the plt. won money of him at cards, and the bond was given to secure payment thereof. Replication, it was given to secure payment of a just debt, and not to secure payment of money won. This replication may conclude to the country, or with an averment ; either is good. 2 D. & E.  
439, Hodges  
v. Sandon.

§ 56. *A material fact well proved, not averred* ; as when the plt. borrowed money of the deft., and pledged a bond as security, which the deft. promised to return *on payment*. Plt. sued on this promise, but did not aver he *had paid or tendered* the debt ; but held well after verdict, as he proved he *tendered it*, and the deft. refused, &c. This seems to be an exception to the general rule, that nothing material can be proved but what is alleged in pleading ; 1 Phil. Evid. 161. 1 Wils. 115,  
118, Alcorn's  
case.

§ 57. Case for perjury ; the plt. must aver the deft. *knew* what he testified was false. Kirby, 7,  
Page v.  
Camp.

§ 58. In suits in inferior courts, the plt. must expressly aver the cause of action arose within their jurisdiction, and particularly allege the places. Kirby 27,  
Wooster &  
al. v. Par-  
sons.

§ 59. Case on a note, absolutely promising to pay, or further secure a debt due, on the contract of one of the defts., the plt. need not aver that notice was given to the deft. of the amount of the demand. Kirby, 128,  
Bulkley v.  
Elderkin.

§ 60. In *qui tam* for usury the plt. must prove the contract precisely, as he avers it was made ; *Wilmot v. Monson* ; see Ch. 180, a. 9, s. 6. 4 Day's Ca.  
114.

§ 61. In an action on a bail bond, an averment that the plt. was lawfully authorized to serve and return, &c., is a sufficient averment of the officer's authority to make the arrest and take bail. So, an averment, he made diligent search after the person or estate of the principal throughout his precinct, but could find neither, and thereon, on such a day, Kirby, 430,  
Gulley v.  
Dennison.

CH. 177. (while the execution was in force) returned the same into the files of the court, &c., with a proper *non est inventus* endorsed, is a sufficient averment of *non est inventus*.

Art. 10.  
3 Bl. Com.  
309.—  
Co. L. 257.  
—10 Co. 91.  
—Finch  
Law, 399,  
302.—  
Booth, 214.  
11 Co. 10.

ART. 10. *Giving colour.* § 1. Giving colour in pleading, is not so much in practice in modern times as formerly; still, however, the party has a right to give colour when he wishes the judges to decide on his title. It is a settled rule, that no man can plead specially, what amounts to the general issue, or total denial of the charge. But deft. may in trespass, and some other actions, avoid this rule in several cases, by giving colour. "He may state his title, specially, and at the same time give colour to the plt., or suppose him to have an appearance or colour of title: bad, indeed, in point of law, but of which the jury are not competent judges; as if his own true title be, that he claims by feoffment, with livery from A, by force of which, he entered on the lands in question, he cannot plead this by itself, as it amounts to no more than the general issue, *nul tort, nul disseizin*, in assize, or not guilty, in an action of trespass; but he may allege this specially, provided he goes farther, and says, that the plt., claiming by colour of a *prior deed of feoffment, without livery*, entered, upon whom he entered, and may then refer himself to the judgment of the court, which of these two titles is best in point of law."

4 Bac. Abr.  
102.—Dr. &  
Stud. 272.—  
10 Co. 88.—  
3 Mod. 166.  
—Co. L. 303.

3 Salk. 273.  
—Dr. &  
Stud. 272,  
277.

§ 2. The first rule in giving colour is, where the deft., in trespass, would bring the cause to be tried by the judges, he allows the plt. to have a shew or colour of action in law, though, in fact, he has none; as where, the deft. says, the plt. claims by colour of a *deed of feoffment*, when nothing passed by it, this is *good colour*. The matter of law raises a doubt in the jury; to wit, whether the land passed or not, by this *feoffment without livery*; but this colour must be by *deed of feoffment*, and not by *feoffment only*. The deft. must plead the general issue; as *nul disseizin* in a writ of entry, &c., or not guilty, in trespass, by the rules of pleading, or he must plead some plea in abatement of the writ, to the jurisdiction, to the party, or else some bar, or some matter by way of conclusion of the plt.; but to plead what shews the deft. had a good title, and no more, is pleading what amounts to the general issue; hence, to avoid this, and a trial *per pais*, he may give colour, as above.

4 Bac. Abr.  
102.

§ 3. Second rule is, the colour given ought to continue, as where the deft. allows the plt's. claim, by a *deed of demise*, for the life of A, it must appear A is alive, and so a subsisting title.

10 Co. 88.

§ 4. Third rule is, the colour given ought to be such, that, if it were effectual, would maintain the nature of the action,

as in assize to give colour of a freehold; colour is given in a writ of *entry sur disseizin*, in *trespass*, &c. in order to make a certain issue for a trial by the judges, and not by a jury. But when the special matter of the plea totally bars the plt., no colour is necessary; therefore, in pleading a *warranty*, an *estoppel*, &c., no colour is necessary.

Ch. 177.  
Art. 11.

10 Co. 90.—  
Dr. & Stud.  
272.

Co. Ent. 652.

§ 5. In *trespass*, if the deft. justify taking the plt's. cattle, *damage feasant*, he need not give any other colour to the plt., for by this justification he admits the property to be in him; there is no colour in ejectment, as there is in *trespass*, but the plt's. declaration must be answered.

4 Bac. Abr.  
102.

§ 6. If a man plead to the writ, or to the action of the writ, he need not give a colour; nor where the deft. entitles himself by statute; nor he who justifies for wreck or strays. So, in forcible entry, the deft. may plead that he was seized until he was disseized by the plt., and need not give colour. When letters patent are pleaded, the deft. ought to plead colour by former letters patent, in this form, to wit, "by colour of those letters patent, made to the aforesaid plt., where nothing passed;" and not, that the plt. claimed by colour of the grant or demise, for to say, *he claims by colour of a deed*, is not to give colour, or shew of title, but only to allege *he claims title*; and without the appearance of title in the plt., and a plea made by the deft. that amounts to the general issue, in itself, no question of law can be raised, which can draw the case into the examination of the judges.

4 Bac. Abr.  
103.—5 Bac.  
205.—Doct.  
Pl. 77.—  
Rast. Ent.  
62.—2 Rol.  
R. 140.—  
Cro. Jam.  
122.

§ 7. The fourth rule; if the deft. derives title to himself by several mean conveyances, and gives colour to the plt. by one who was last named in the conveyances, this is ill; but the deft. must give colour by one first named in them. In *trespass*, for taking and carrying away the plt's goods, the deft. justified, for that J. S. was possessed of them, as of his proper goods, and the plt. claiming them by colour of a deed of gift, afterwards made, by which nothing passed, took them, and that the deft. retook, and thereon the plt. demurred, for the colour given to the plt. is a good title for him, and confesses the interest in him; for colour ought to be such a thing which is good colour of title, and yet is not any title, as a *feoffment without livery*, &c.; but a deed of goods, without other ceremony, is a good title.

§ 8. Giving colour in certain real actions, see Ch. 178 art. 24; see colour pleaded in *Quarles v. Quarles & al.*

ART. 11. *Notice and request.*

§ 1. Though much has been already said in the preceding chapters upon this important branch of the law, especially, in stating rules and cases, in framing declarations, and in many cases, occurring under various heads, yet much

See many  
good forms  
of notice.  
10 Wentw.  
223 to 228

CH. 177. remains to be added. As to what has been said on this subject, see Rules and Cases in American Precedents of declarations, Ch. 11. As to bills and notes, see Ch. 20: where the plt. doing a thing at the deft's. request, is a consideration; see Consideration; see Ch. 119, Ch. 123, also Ch. 144 and Ch. 177. art. 9.

Index, references to sundry *items*, 114, 117.

Where suit is sufficient, and no notice is necessary;

Yelv. 53, 66, 121, 122, 168.—

Where a special request is necessary or not;

Cro. El. 74, and cases referred to.—

Yelv. 66, 67. —Hutt. 73.

—Cro. Jam. 183, 505, 523.

§ 2. Requests are of two kinds, *general*, as when the plt. says in his declaration, the deft., *though often requested*, has not done an act; this is mere form, and deserves no particular attention. Secondly, *special requests*; that is, requests or demands actually made on a party, and as these must be proved, usually, to a jury, they must be laid and averred, with time and place; that is, that on such a day, and at such a place in the county or district, the party was requested to do the act, as to pay money, deliver goods, make a deed, &c. &c.

§ 3. Notices one party must give to another, in order to entitle the party bound to give notice, to his action; to make his transaction legal and valid; are of several kinds: As notice to the deft., the plt. has done an act necessary to be done by him, to entitle him to his action: or 2. Notice to the deft. to do an act he is not bound to do until notified: 3. Notice of sales at auction, and of other sales: 4. Notice to produce papers: 5. Notice one party has a *lien* on monies or property in another's hands, in order to his keeping the same for the party giving notice: 6. Where one party is to do an act, as repairs, &c., and the other is to prepare the means on notice, as find timber, &c.: 7. Notice to appear at some court, or before some magistrate, at time and place: 8. Notice by one attorney to another of trial, &c.: 9. The form and manner of giving notice: 10. Form and manner of making a request or demand: 11. Notice as required to be given by many statutes in particular cases: 12. Notice in equity that makes one privy to a trust, and so trustee. Ow. 41; Salk. 388; Cro. Car. 241, 271; Hob. 42.

2 Salk. 457, Smith v. Goff.— Cowp. 30.

But notice is not necessary to be averred when the matter can be intended to be known without notice.

If a statute prescribe a particular form of notice, that must be fully stated and pursued exactly, and an averment that *due* notice was given, is not sufficient; and a defective notice is not cured by appearance of the party.

12 Mass. R. 121, 126, Barker v. Mair.

Where a party, by his contract, is entitled to twenty days' notice - to begin a job, as *painting* a house, &c., may waive this right by his silence, when told he should have notice when to begin, and not claiming the twenty days' notice,

but silently acquiescing in notice proposed by the other party. CH. 177.  
Art. 11.

§ 4. It is a general rule, if I am bound to make such assurance as J. S., a *stranger*, shall advise or direct, I am bound at my peril, to procure notice as to what he advises or directs; but if I am bound to make such assurance as *your counsel* shall advise or direct, you must give me notice as to what he advises, &c., for the counsel must advise the party that employs him, and this party give notice to the other.

3 Woods' Con. 600.

§ 5. So, if I be bound to make to A such an estate in W., I must give him notice what manner of estate I intend, as I am to do the first act, and make the estate, though the grantor, I am to direct the manner of the estate, and so give him notice of it. 3 Salk, 247.

§ 6. And as to the manner of giving a party notice, it is sufficient when the law requires notice to be given to him, before he be affected by an act *to leave that notice at his house*, except in process to bring the party into contempt, then *personal* notice is necessary. So, notice to the tenant from year to year to quit, given and explained to his servant maid, at his own house, not on the leased premises, deemed sufficient, on a presumption he had it, though no evidence he had it; but he did not call her to prove she did not communicate it to her master: Per Buller J., the jury might well presume that the notice reached the tenant: So, by mail is good. 1 Johns. Cas. 413. 4 D. & E. 464, Jones v. Marsh.—  
1 Caines' R. 252.—Same rule, New York;  
3 Johns R. 440, Johnston v. Robins.

§ 7. The court held, that in a *criminal prosecution*, notice must be to the *deft. himself* to produce papers; but in *civil actions*, also in *qui tam actions*, notice to the *deft's. attorney* is sufficient. 3 D. & E. 306, Gales, q. t. r. Winter.

§ 8. This was an information against the *deft.* for illegally importing teas, and notice was to his agent and attorney to produce certain letters, containing evidence against the *deft.*, and held, sufficient, but that he was at liberty to produce them or not; but if he did not, attested copies might be read against him, on the ground that they were the best evidence in the power of the attorney general, not on the ground of a fault in the *deft.* in not producing the original evidence, which was against himself. 2 D. & E. 202, 204, Attorney-General v. Le Merchant.

§ 9. If I am to do an act to or with A, at a place named, but no time appointed, as to pay money, deliver goods, or make a feoffment to him, I must give notice to him of the time I will do the act, that he may be there to receive and do his part. 5 Com. D. 126.—Co. L. 211, 212.—  
8 Co. 92.

§ 10. Another rule; if I am to do a thing, on the feoffee or obligee's doing an act limited, within his knowledge, he 3 Com. D. 106.—Hob. 51.—

- CH. 177.** must first do his act and give me notice of it, as the price he  
**Art. 11.** sells goods to others for, when I am to give him that price,  
 and if he sue me, he must aver the price and notice in his  
 declaration; and one's title to land shall not be defeated by  
 a secret condition or conveyance without notice of it to him;  
 and one is not bound to take notice but where the means of  
 it are in his power. But, generally, one interested in land  
 is bound to take notice as to what is done concerning it,  
 especially, if no one is bound to give notice. As husband,  
 tenant for life, remainder to his wife for life, remainder to  
 his son in tail, the husband made a feoffment with warranty,  
 which barred the son, and after his death the wife joined  
 with the son in a fine. Held, her estate was forfeited without  
 notice of the feoffment; for it being on the land, was a noto-  
 rious thing, of which she was bound to take notice, at her  
 peril, especially as no one was bound to give her notice.  
 So, if a *feme* lessor marry, the lessee is bound to take notice  
 of the marriage, and, at his peril, to pay the rent to the  
 husband.
- Cro. Jam.**  
 492.—5 Co.  
 113.—  
**Cro Car.**  
 392, 394,  
**Gymlett v.**  
**Sands.**
- Gardner v.**  
**Norman,**  
 6 Cro. Jam.  
 317.
- 3 Com. 107.** § 11. So, every one is bound to take notice of a condition  
 affecting his estate in land, &c., especially if it be expressed  
 in the deed, will, or writing, under which he holds his estate.
- 3 Com. D.** § 12. *The manner of making request* ought to be certain and  
 108.—1 Rob.  
 428, 465. express; as where the lessor is to find timber for the lessee,  
 who is to repair, the lessee must not only request him to find  
 it, but also give him notice how much is wanted, and the  
 request must be to him who is to perform; but when I am  
 to deliver possession to A, or his assigns, and he assigns  
 to two, a request to one is sufficient; but a request, at any  
 place, is sufficient, though the act is to be done at a certain  
 place, and also, the request must be made *when the condition*  
*can be performed.* As if a master be bound to make his  
 apprentice free, &c., when his time is out, *if requested*; must  
 be a *special* request, *when his time is out*, and it is a good  
 defence for the master to plead that he was not requested  
 then, or after; and, it is not to be intended one will request  
 a thing to be done before it is to be, or can be done; and  
 want of *special* request, when necessary to the action, is not  
 aided by verdict, nor by pleading *non assumpsit* and verdict  
 thereon, for that is no waiver of the request; and as to the  
 time of request; 1 Wils. 33.
- Fitzburgh v.**  
**Dennington,**  
 6 Mod.  
 227 and 259;  
 but see  
**Frampton v.**  
**Coulson,**  
 Am. Preced  
 78.—5 Com.  
 D. 356.—  
 3 Bul. 299.—  
**Jones 85.**
- 5 Com. D.** § 13. But if a *special* request be necessary, and the plt.  
 357.—Jon.  
 56. alleges it, but omits the time, and the deft. does not join  
 issue on the request, but pleads *non assumpsit* &c., it is aided.  
 And if a promise be by three persons, a *special* request to  
 one is sufficient. So an executor sues on a promise to the  
 testator to pay him on request, and lays a *special* request
- Hard. 38.**

by the executor, and *licet requisitus*, only by the testator, this is sufficient request, and well made, for the action is founded on a request made by the executor. CH. 177. Art. 11.

§ 14. So, if it be said, the plt. at such a day and place, shewed the note and requested it, it is well, though not said *then* and *there*, for all is intended to be done at the same time. So, if a special request be laid in the *first* count; *alike requested*, is enough in the second count, *for it refers to the first*. This is also among the proofs that one count may refer to another, though it has been often said one cannot help another. But notice not expressed may be implied and intended; as in debt for freight on a charter-party, and the plt. says he delivered the goods to the deft. himself, notice is intended. And whenever an act, stated in a declaration, may be construed to be done to the deft. himself, notice is intended. So, notice to a party need not be stated where he is held to take notice, as each member of a corporation is bound to take notice of its by-laws. 5 Com. D. 357.—  
2 Vent. 75.—  
Cro. El. 240,  
Barnes v. May.  
5 Com. D. 359, Dodd v. Atkinson.  
Cro. Car. 498.

§ 15. *Performing part supersedes special request*; as where the plt. bought hay of the deft., in consideration whereof, he promised to deliver it to the plt., and allow him to take it away as he wanted it, *when requested*; plt. averred, the deft., after suffering the plt. to take part away, sold the residue to other persons. Held, this allowing the plt. to take a part, made it unnecessary to aver a request to deliver the residue. 10 East, 359, Bowdell v. Parsons.

§ 16. *Notice to be given by one party to the other, of trial*. This is not much practised in the United States; but only in a few courts that follow the English practice. For the cases under this head, see Salk. 645; Mitchell v. Griffiths, 2 D. & E. Hall v. Buchanan; 1 Stra. 531, Green v. Gauntlett; Dougl. 70, Hayly v. Riley; 2 Stra. 1164, Bogg v. Rose; 1 Dall. 211; 2 Dall. 195; 1 Johns. Cas. 391, Burr v. Skinner; 3 Johns. R. 144, Clinton v. Mitchell; 2 Johns. Cas. 111, Knapp v. Mead; 2 Dall. 150; 5 Johns. R. 232; 1 Johns. Cas. 316, Malcolm v. Bayard; 3 Johns. R. 250, Kleecke v. Styles; 7 Johns. R. 537, Dizen & wife v. Bates; see Practice, Ch. 194; 1 Johns. R. 517, Blasdale v. Babcock; 6 Johns. R. 19, Jackson v. Sherman.

§ 17. If papers are on record, the court will not have notice served on a party to produce them, merely as a cheap mode of procuring evidence. When notice must be given or not, to produce papers; 13 Johns. R. 92; 17 Johns. R. 293. The general rule is, in civil and criminal cases, that if the form of the action gives notice to the party to be prepared to produce the papers, if necessary, to falsify the evidence of the other party, it is not necessary to give notice. 2 Dall. 332.—12 Johns. R. 489, Clowes v. Hawley.

## CH. 177.

## Art. 12.

10 Mass. R.  
230, *Lent &*  
*al. v. Padel-*  
*ford.*

3 Cranch,  
293, *Buddi-*  
*cum v. Kirk.*  
—*Kirby's R.*  
112, *Suffrien*  
*v. Pringle.*

§ 18. When a matter lies, equally, in the knowledge of plt. and deft., an averment of notice is not necessary, as if it be an act to be done by a stranger; and where a promise is to do a certain act, or pay a sum of money, and the deft. has not done the act, a special request to pay the money needs not to be alleged.

§ 19. In the law of Virginia, it is not sufficient to give notice to an *attorney at law* of the time and place of taking a deposition, but he may agree to receive or waive notice, and is bound. And an assignment of debts, and balances of accounts, cannot be pleaded as accord and satisfaction; and an adjournment over *several intermediate days* cannot be made on notice to adjourn from day to day.

§ 20. What is notice to a purchaser of a prior title, so as to affect his purchase in equity. Several cases, *Cooper's Pl.* 284.

§ 21. *Request to deliver goods not necessary, &c.* A agreed to pay B the balance of account "in good *West India rum*, to be delivered in *New Haven*, as soon as any should come to his hands, or if none should come, that he would then procure some, and deliver it at the current market price; A held to give B notice when said rum comes to hand, and B need not demand it, but has an action without, after waiting a reasonable time for the rum to arrive, or for other rum to be procured.

ART. 12. *Since the last continuance.*

§ 1. The plea of matters since the *last continuance* of the action, is in bar or abatement, and differs from other pleas only in this, to wit, the fact which warrants this plea first exists or happens since the last, and before the next continuance; as in this case, the deft., after *venire facias* issued, and after the last continuance thereon, &c., pleaded generally, that since the last continuance, to wit, on —, he became a bankrupt, and that the cause of action accrued before such time as he became a bankrupt; *hoc paratus*, &c.; and verified his plea by affidavit. Held, the court was bound to receive this plea; and whether good or bad, can only be determined on demurrer; as it is like any other plea, with the above difference as to time; and if bad, final judgment is given against the deft. 1 Com. D. 93, *Broome v. Burdly*.

§ 2. In this case, after verdict against the deft., he obtained a rule for a new trial, which was discharged after argument. He then pleaded, *puis darrein continuance* entitled of the term generally; and the court refused to order a special memorandum of the day when it was filed, under these circumstances, (because properly delayed until the motion for

2 Wils. 137,  
139, *Paris*  
*v. Salkheld.*  
—*Yelv.* 141.

Also 3  
*Caines' R.*  
172.

3 D. & E. 554,  
*Lovell v.*  
*Eastaff.*

a new trial was disposed of.) Such a plea, filed and verified on oath, is a matter of right the court cannot set aside on motion, but must receive it. The plea was, that the plt. after the trial and verdict and before the day in bank, became a *bankrupt*. How this plea is pleaded in bar. 4 East, 502. Ch. 177. Art. 12.

§ 3. Regularly the deft. can have but one plea, because there can be but one verdict in a cause; but if any new matter happen, pending the writ, he may plead it after a former plea, provided it be pleaded before the next continuance after such matter happens; and pleas of this kind are *twofold*, in bar or in *abatement*. If after a writ of *inquiry* is awarded, the plt. releases, the deft. cannot plead it; for judgment is already; but if the plt. die, such death may be pleaded: And 1 Com. D. 93. Salk. 178. 4 Bac. Abr. 142, 143, 144. —1 Com. D. 92, 93.—2 Cro. 82.—2 Vent. 58.

§ 4. Things may be pleaded before the writ purchased; after purchased, and before issue joined, must be pleaded pending the writ; and pleas after the last continuance it is said, are only those things that happen after issue joined; and if for delay, the court may refuse this plea. 1 Com. D. 93. 6 Ins. Cl. 522. —4 Bac. Abr. 143.

In this book it is said, that if after demurrer a plea be pleaded since the last continuance, and there is a new demurrer on that plea. yet the court must consider of the first demurrer; “for if upon that standing confessed by the demurrer, the plt. could not have his action, the court cannot give judgment for him, however the latter issue or demurrer pass; but otherwise it were, if the first had been an issue; for then nothing were confessed to his prejudice; and then that had been utterly relinquished by a second issue or demurrer.” Hob. 81, Stoner v. Gibson.

If a plea after the last continuance be put in, it is a waiver of the plea in bar; and no advantage can be taken of any thing in the bar. Salk. 178, Barber v. Palmer.

§ 5. Debt against an administrator after demurrer joined. Administration was repealed and granted to another; and the court held, that this plea may be pleaded after issue joined but not after demurrer. Moore 871.

§ 6. Held, that after *verdict* at *nisi prius*, a release can be pleaded only in *audita querela*, to hinder execution; otherwise, before verdict. Any matter arising after issue joined and pleadable, *puis darrein continuance* must be so pleaded, and is not in evidence on the general issue. 4 Bac. Abr. 143.—7 Johns. R. 194, Jackson v. Rich.

§ 7. *Payment of part since, &c. pleaded in bar and good*. This was debt on bond. The deft. pleaded payment of part *puis darrein continuance*, which the plt. accepted, in bar. Held, by Holt, the deft. could not plead this in *abatement*, but might in bar; and if it had been debt on *contract*, this 12 Mod. 541, Pierce v. Packston.

CH. 177. had been a bad plea, "because it might be given in evidence."  
Art. 12.

Payment  
since, &c.  
7 Johns. R.  
399.—  
5 Johns. R.  
268.—3 Ins.  
Cl. 537.

§ 8. This plea is like any other in principle, with the single exception as to the time of the matter of its accruing. If one of the defts. dies pending the action, the other comes and says, that *after the last continuance* of the plea, to wit, after —, from which day the complaint was last continued to —, before which day, to wit, on —, at —, the said T. (other deft.) died, whereby no process or any thing in the plea aforesaid can farther be done against the said T., &c.

3 Ins. Cl. 531.  
—2 Cro 261,  
Hawkins v.  
Moor.

§ 9. So the deft. may plead *puis*, &c. (as above;) the *plt. entered into a part of the land*, and put the deft. out from the same, and that the *plt.* is seized thereof in his demesne as of fee; *hoc paratus*, &c.; wherefore he prays judgment of the writ, &c.

Thomp. 1.

§ 10. *That the plt. took a husband*, as above. The said *plt.* took to husband, one J., who is yet living, to wit, at —; *hoc paratus*, &c. *Replication*, *did not marry*, &c. Says her writ ought not to be quashed; because she says that after —, and before —, she did not take to husband the said J. as the deft. alleges, and offers an issue to the country.

3 Ins. Cl. 533.  
—7 Ins. Cl.  
141.—3 Ins.  
Cl. 534.

§ 11. So, a release in *scire facias*, *pleaded by the deft.* as given by the *plt. since the last continuance*, and with a *proferat*, and after judgment given on —, (15 St. Martin,) (to which 15 St. M.) the complaint aforesaid from —, was last continued at —, first did remise, release, and quit claim, for himself and his heirs, to the deft., &c. all executions and judgments, &c. all actions, &c.; *hoc paratus*, &c.; and prays judgment if the *plt.* have any execution, &c. *Replication*, the release was made by *duress*; *precludi non*: Prays judgment, &c. *Rejoinder*, that he was at large, &c.; and issue offered.

1 Com. D.  
93, 94.—15  
E. IV. 5.—  
Lut. 1178.

§ 12. There is a distinction as to matters arising *after* issue joined and *before*: After, the deft. must plead, *since the last continuance*; but before, yet pending the writ, need not, though in bar or abatement; but may be pleaded without saying, *after the last continuance*: so, if any thing happens that abates the writ before any plea pleaded, though there be a continuance after the thing happened; but it must be shewn to be pending the writ, and before plea.

1 Wheaton's  
R. 215, Ren-  
ner & al. v.  
Marshal.

§ 13. *In abatement*. *After action in another state pleaded in abatement of the first*. Judgment against the deft. *peremptory*.

Error to the Circuit Court, Columbia, June term, 1813. Marshal declared against Renner & al. in assumpsit, on an inland bill of exchange, drawn by A, on them, and accepted

by them. Plea, *non assumpsit*, and issue joined. Continued to December term, 1813. Then Renner & al. pleaded in abatement, a suit in chancery in Virginia, commenced October 19, 1813, by Marshal against them and B & al., for the same cause. Marshal replied, the prior pending of this suit in the Circuit Court. Renner & al. rejoined in substance, the matter of their plea. Plt. demurred specially. Judgment, plea, and rejoinder not sufficient in law to preclude the plt. from maintaining his said action; and judgment in chief. On error brought, Supreme Court held, 1. That said suit in chancery so commenced in another state pending this action at law, though for the same cause, could not be pleaded in abatement of it; though a prior suit may abate a subsequent one in personal actions: 2. The judgment in such case as the present against the deft., is *peremptory*, as well on demurrer as on trial: 3. The court assesses the damages, where, as in this case, they are a mere matter of computation. As to this last point, see Damages, Ch. 28; and Holdip v. Otway, Ch. 177, a. 7, s. 4; and Ch. 40, a. 23.

CH. 177.  
Art. 12.

Chitty on  
Pleading,  
636, cited.

§ 14. Writ of entry on a mortgage. The plt., Jonathan Walcut, in 1806, mortgaged to William Walcutt, as security to a bond of maintenance, subject to which the plt. conveyed to John Bellows, and took back the mortgage sued in this action. Bellows conveyed to the deft., subject to said mortgage, and took from him an indemnifying bond &c. Pending this action, said William Walcutt recovered on his mortgage and leased to the deft. for a year; under this lease he held; and the court held, that when the deft. is vested pending the suit by a stranger, having a better title, this will abate the writ. 1 Com. D. Abatement H. 56: so, if fairly recovered against him by a stranger; but in both cases, the fact must be pleaded as having occurred *after the last continuance*. Id. H. 54. Deft. defaulted, and questionable if this matter so pleaded had availed him, when sued as mortgagor for the purpose of foreclosure; and see Penniman v. Hollis, Ch. 112, a. 5, s. 1; as there may be a judgment to this purpose without immediate possession by the plt.

14 Mass. R.  
409, Walcutt  
v. Spencer.

§ 15. A release of the premises in ejectment, after issue joined, ought to be pleaded by the deft. since *the last continuance*; but if admitted by consent, its effect is as if duly pleaded.

9 Johns. R.  
55, Jackson  
v. Demont.

§ 16. A discharge under the insolvent act, pleaded in bar, *puis darrein continuance*, need not be verified by affidavit, unless offered at the circuit; nor then, if probable cause of its truth be shown to the judge, who may receive it without oath or not, at his discretion: 2. Such a plea cannot be

9 Johns. R.  
250, 251,  
Bancker v.  
Ash.

CH. 178. treated as a nullity when pleaded in bank, and no affidavit ;  
 Art. 1. but the plt. must reply to it, or move the court to set aside.

§ 17. A plea, *nunc pro tunc* : As the deft. may plead an insolvent discharge, though more than one term has intervened, on payment of costs. 9 Johns. R. 255, Morgan & al. v. Dyer.

10 Johns.  
 161, 164,  
 Morgan v.  
 Dyer.

§ 18. And it is at the discretion of the court to receive this plea ; and if pleaded after a term has intervened, the plt. ought not to demur to the plea, but move the court to set it aside.

2 Johns. R.  
 294, 295.

§ 19. Pleaded by one who, being insolvent, got his discharge after &c. Plt. allowed liberty to discontinue.

## CHAPTER CLXXVIII.

### PLEADINGS.—PLEAS IN BAR.

#### ART. 1. *General principles.*

Usually when the deft. has no further expectations from any of the above pleas, he comes to his plea in bar of the action, and on the merits.

§ 1. As in every action and prosecution against the deft. he is charged either with a *breach of contract*, or with some *tortious, negligent, or criminal act*, his plea in bar must be framed accordingly. In this plea the deft., first, *denies the thing was done*, and pleads the general issue ; or secondly, he *excuses it, as done by accident and without his fault* ; or thirdly, he *justifies the thing done*, admits it done, and insists on something that made it lawful ; and *justification must* be pleaded, unless specially allowed by some statute or agreement to be given in evidence ; but matters of *excuse* may be pleaded or given in evidence.

In every case a right issue must be formed, material, formal, and consisting of "*one single, plain, and clear point* ;" but this issue, or point, or matter put in issue, may consist of, or include in it, *many connected facts*, material to constitute the pleader's title or right ; and this in *criminal* as well as *civil* causes, as in *Miles v. Williams*, Ch. 177, a. 9, s. 5. In *Robinson v. Rayley*, and 2 Johns. R. 462.

3 Bl. Com.  
 306.

§ 2. And many other cases.

In these pleas in bar are included the general issue, which denies the whole declaration at once, as *not guilty, nul dis-*

*seizin, non cepit, never promised, &c.* and special pleas in bar, which set forth the particular facts, the deft. relies on; and they are various according to the circumstances of his case. 3 Bl. Com. 305. Ch. 178.  
Art. 2.

ART. 2. *Issue, how formed.*

§ 1. According to all the good rules in pleadings, an issue is so formed as to be upon "*a single, certain, and material point*, issuing out of the allegations of the parties, to be tried by twelve men, regularly consisting of an affirmative and negative." There is no question as to this rule in forming an issue. The only question is, what is a *single, certain, and material point*, issuing? And where a *single fact* is put in issue, no question arises; but very often *many facts make but one point*, being all connected and leading to the same point or issue; as in the leading case in 1 Burr. 320, which may be here well repeated. In this the plt. traversed "that the cattle were the deft's. *own cattle*; and that they were *levant and couchant* on the premises, and *commonable cattle*." Held, to be a good, and single, certain, and material issue, on demurrer, pointing out the three distinct facts so pleaded; and Lord Mansfield said, it was not necessary this single &c. point should consist of a *single fact*. Here the *point* is, the cattle being entitled to *common*; but in fact they must be the deft's. *own cattle*; also *levant and couchant*, and *commonable*. 4 Bac. 54.—  
Co. Lit. 124.  
  
Robinson v.  
Rayley.

§ 2. An issue must not include a *negative pregnant*; as a plea alleging that one did not give *by deed*; implying he gave by some other conveyance, so that the court may be in doubt whether the party ought to have judgment, though the issue be found for him. An issue cannot be taken on a general plea of performance. Co. Lit. 126.  
  
2 Johns. R.  
416.

§ 3. Generally two *affirmatives* do not form a good issue; but some special cases are exceptions. As where the deft. pleaded, the plt. was born in *France*, and the plt. replied he was born in *England*. Held, it was well; for if he should traverse the birth in *France*, it could not be tried; and on such pleadings the jury shall be charged; and on evidence he was born in *France*, out of the king's allegiance, they shall find he was born out of the king's allegiance; on evidence he was born in *England*, or *Ireland*, &c. they shall find he was born within the king's allegiance. Co. Lit. 261,  
cited, 1 Wils.  
6.

§ 4. In error. Was debt on an obligation; plea, by *duress*. Replication, that the deft. was at liberty, and made the bond of his own free will; not for *fear* of imprisonment; and concluded to the country. Verdict for the plt. &c. Error assigned in common form. Was urged this replication was bad, as it was *per minas*, rather than *per duritiam*, and con- 1 Wils. 6, 7,  
Tomlin v.  
Burlace.

- CH. 178. sisted of *two affirmatives* ; also must have been objected to ;  
 Art. 2. for in support of this replication it was urged, that the old  
 way of pleading was, "that every issue must consist of an  
*affirmative* and *negative*, but that is now got over." 1 Inst.  
 126 : "and an issue now may be of an *affirmative upon an*  
*affirmative* ;" and cited the above alien case : so, if the lord  
 avows for rent service, and the plea in bar be, that the *dis-*  
*tress was made out of the avowant's fee* ; and the replication  
 that it was made *within*, is a good issue. Rastell, 555 : so,  
 the issue on *plene administravit* consists of *two affirmatives* :  
 so, the issue in a writ of right ; but admitting this replication  
 is *informal*, yet it is good after verdict, and aided by 4 & 5  
 Anne ; and of this opinion was the whole court.
- Co. Lit. 261. § 5. So the issue may be good, though the *affirmative* and  
*negative* be not in precise words ; as where the deft. pleaded,  
 the plt. had nothing in the land at the time of the lease, and  
 the plt. replied, he was seized in fee.
- Cro. El. 257. § 6. The general issue is contrived so as to put the whole  
 —4 Bac. matter in issue, that is, in question ; as in *trespass* or for any  
 Abr. 54. *misfeasance, not guilty* ; in *debt, he owes nothing* ; in *debt* on  
*specialty, non est factum*.
- 2 Hale's P. § 7. On indictment for treason or felony, there can be no  
 C. 258, 259. *justification* by plea ; but the party has every advantage in  
 evidence, on the general issue of not guilty ; and his plea  
 to a felony consists of two parts, to wit, 1. The issue of *not*  
*guilty* ; to which the clerk joins *cul. prist* : 2. Putting himself  
 upon the country, when the clerk demands how he will be  
 tried ; and if either of these fail, it is standing mute in law.
- § 8. If the deft. plead in *criminal cases*, any matter of  
 fact to the indictment, or pleads former conviction, or ac-  
 quittal, he shall plead over to the felony, the general issue,  
 not guilty ; nor shall this be *double*, or a waiver of his *special*  
*plea* ; and though he do not do this on his plea, but his plea  
 is found or tried against him, yet he shall not be thereby  
 convicted without pleading to the felony, the general issue,  
 and having trial thereon ; but he may plead to the jurisdic-  
 tion without answering to the felony ; and if he plead a  
 plea that confesses the fact, yet the better opinion is, that  
 he ought to plead over to the felony ; but not if he plead a  
 pardon ; but if that be found to be defective or insufficient,  
 he shall be put to plead to the felony, not guilty ; and on  
 not guilty alone can the prisoner receive final judgment of  
 death ; because only on the issue of not guilty and guilty,  
 can the jury find a verdict of guilty ; and only on such find-  
 ing can there be such judgment.
- 4 Bl. Com. 332.

ART. 3. *Immaterial issues.*

§ 1. A *material* issue is one, if found for the plt., shews he is entitled to the thing he demands; if for the deft., that he is well discharged. An *immaterial* issue, is when it is taken on such a point as will not determine the merits, and if found for the deft., will not destroy the plt's. right of action; and what is material cannot be proved in the trial, not being put in issue.

§ 2. Cases.—Error. Was debt on bond conditioned to pay money on the *twenty-fifth* of March. Plea, payment on the *twentieth*. Plt. replied, he did not pay on the *twentieth*. Issue joined on this. Verdict for the plt. and judgment. Held, if a verdict had been for the deft. it would have been good; for payment on the twentieth is payment on the twenty-fifth; but as the verdict is for the plt., the issue is *immaterial*, as non-payment on the twentieth is no evidence of non-payment on the twenty-fifth, as it might be paid in the meantime. Judgment reversed; nor was this issue aided by verdict; it was *dehors* the condition.

§ 3. Declaration on a promise to find the plt., his wife, and servants with meat &c. for three years *on request*. Plea, that he promised to find the plt. and his wife meat &c.; *absque hoc*, he promised to find meat &c. for the two servants &c. Replication, that he did promise to find &c. for three years next following; and *hoc petit*; and verdict for the plt. Held, he could not have judgment; for no issue was joined; for the promise in the declaration, traversed by the deft., and in the replication, are different.

§ 4. Debt for £105. Plea, that he paid the aforesaid £100 &c. Replication, that he did not pay the aforesaid £105; and verdict, that he did not pay the aforesaid £105. Held, the plt. could not have judgment; for no issue was joined.

§ 5. Trespass. Plea, accord between the plt. and J. S. on the one part, and the deft., of the other. Replication, no such accord between the plt. and the deft. as the deft. had alleged. Verdict for the plt. Held, he could not have judgment; for the bar shews one accord and the replication another; and the court could not decide which was proved.

§ 6. So, trespass. Plea, *special justification*. Replication, *of his own wrong*, and *without such cause*. Held, ill, after verdict; for the replication only affirms the declaration, and does not confess or deny the special matter in bar. How special justification must be answered in trespass, see Trespass; see also, Fletcher v. Hennington, Ch. 165.

CH. 178.

Art. 3.

Cro. Jam.  
580.—Cro.  
El. 227.—  
Lev. 32.—4  
Bac. 56.

10 Mod. 147,  
Merril v.  
Joselyn.—2  
Cro. 434.—  
Cl. El. 828.

Cro. Jam.  
434, Holmes  
v. Bocket.  
4 Bac. Abr.  
56.—1 Bac.  
103, Kirlice v.  
Lees.

Cro. Jam.  
585, Sand-  
bach v. Tur-  
vey.

4 Bac. Abr.  
57.—1 Bac.  
103.—Rol.  
R. 86.

4 Bac. Abr.  
57.—Sid.  
341.

CH. 178.

Art. 4.

Str. 313,  
933, 1011.—  
Cro. El. 227.  
—2 Mod.  
137.—10  
Mod. 19.

§ 7. An immaterial issue, does not traverse what is materially alleged in pleading; but is on such a point as will not determine the merits of the case; but an informal issue is on a material point, but the material matter is not traversed in a right manner. See cases next article &c.

ART. 4. *Informal issues.*

§ 1. These are aided by verdict. By this issue, all matters of substance are put in issue, though not in a formal manner; and it is good on a general demurrer, and after verdict.

Cro. Car.  
316, Parker  
v. Taylor.

§ 2. *Cases.* Debt on bond conditioned to pay £8, on a certain day. Plea, payment on the day, and concluded to the country. The issue was joined and found for the plt. Held, this was an informal issue; for the deft. should have concluded *hoc paratus* &c.; but want of form is waived by both sides, by going to issue; and aided by the statutes of jeofails.

4 Bac. Abr.  
59.

§ 3. Debt on a usurious bond. Plea, that it was corruptly agreed, and that the plt. corruptly received the money; and issue on both: one material and one not. Held, this issue though informal, was aided after verdict for the plt.

Cro. El. 455.—  
Cro. Jam. 44,  
Pigot v. Pig-  
ot.—4 Bac.  
Abr. 57.

§ 4. See Chamberlain v. Nichols, to this point, Ch. 156. This was an action of replevin. The deft. avowed for rent; for that Eleanor Enderby was seized of the *locus in quo*, in fee, and married Thomas Pigot, and by him had issue John Pigot, and died; and Thomas Pigot being tenant by the curtesy, the reversion in fee in his said son, John Pigot, he granted a rent charge for life, to the deft., and showed the death of the said tenant by the curtesy, and so avowed &c. The plt. said, the said Eleanor Enderby was seized in tail, and the estate descended to the said John, in tail, and that he granted the rent and died, and that the land descended to the deft's. wife, as heir in tail; *absque hoc*, that the said Eleanor was seized in fee; and issue was joined and found for the deft.; and moved in arrest of judgment, that it was not well joined; for the seizin in fee of the grantor of the rent, should have been traversed, and not that of an ancestor paramount; for that was not material; but the court held, that as seizin in fee was alleged in the said Eleanor Enderby, and the conveyance of the reversion to her son, John Pigot, the seizin alleged in her might be traversed, and though not an apt issue, it was aided by 32 H. VIII.

Cro. Jam.  
312, Gill v.  
Glass.—4  
Bac. Abr. 58.

§ 5. Glass brought debt for rent reserved on his own lease for years. Plea, that he had nothing in the tenements at the time of the lease. Replication, *quod habuit in tenementis predictis* &c.; issue, and found for the plt. and judgment for him; and error assigned, that the replication was bad; for he ought to have shewn to the court what estate he had, at

the time of the lease, that the court might judge if he had good authority to demise. Held, the deft. might well have demurred for the badness of the replication; but as he did not, the verdict has made it good; for the court now sees the plt. had power to make the lease, and estate to demise, as a verdict is found for him. CH. 178.  
Art. 4.

§ 6. In *assumpsit* after verdict, *not guilty* is aided by the statute; for there is a deceit alleged and the issue is only misjoined; but the plt. might have demurred. Cro. El. 470,  
Corbyn v.  
Brown.

This was debt on a bond of £13 13s. 4d. The deft. pleaded, that his supposed testator, B., died *intestate*, and that administration of his goods was granted to one Edward Keeble, before this action was commenced, who administered and still doth administer. The plt. replied, that the said B. died *intestate*, and that after his death, and before administration granted, as aforesaid, divers goods of his, (naming them particularly, and their value, to the amount of the plt's. debt,) came to the deft's. hands, which he, as executor of B., administered or otherwise converted and disposed of to his own use; and *hoc petit*, and issue; and found for the plt., and judgment for him; and held, well; for the verdict is true, if either he administered or converted them to his own use; and both must be as executor. Hob. 49,  
Keeble v.  
Osberton,  
ex'r.

§ 7. Covenant, that he was seized in fee. Breach assigned, he was not seized in fee; and so had not performed his covenant. Deft. pleaded, *he had not broken his covenant*. Issue, and found for the plt. Moved in arrest of judgment, that the issue consisted only of *two negatives*, to wit, *not seized in fee, and not performed &c.* by the plt., and *had not broken his covenant*, by the deft.; and he ought to have answered particularly to the breach assigned; but judgment for the plt.; for it is *argumentative*; for if he was not seized in fee, he had broken his covenant. Sid. 289.—4  
Bac. Abr. 60.  
—See Ch.  
121, a. 2, s.  
15.

§ 8. This was an action of assault and battery, against the master of a ship. Plea, that the plt. neglected his service, *per quod moderate castigavit*. Replication, *quod non moderate castigavit*. Issue, and found for the plt. Held, well; for though this is an *informal* traverse, as it rather traverses the *chastisement*, than the moderate manner of doing it; and the right traverse should have been, *of his own wrong, and without such cause*; yet it was good after verdict; for the jury found he did not beat him moderately. Sid. 444.—4  
Bac. Abr. 59,  
82.—1 Bac.  
104.

§ 9. Debt on bond, conditioned to pay £100, 31st of September. Plea, payment the said 31st of September, according to the condition of the bond; and issue, and found for the plt., that the deft. did not pay. Error assigned; because the verdict being on the payment the 31st of September, is an idle and void issue. Held, there being no Cro. Car. 78,  
Purcase v.  
Jagon.—Co.  
Lit. 42.—  
Noy. 85.—1  
Bac. 104.

CH. 178. such day as the 31st of September, and the jury having  
 Art. 5. found that the money was not paid on that day nor before,  
 ~~~~~ have in effect, found it was never paid, which is a good ver-  
 dict; and judgment for the plt. affirmed.

ART. 5. *As to pleas amounting to the general issue.*

Law's Plead-  
 ing, 111, 112.  
 —3 Bl. Com.  
 306, 306, 309.  
 —4 Bac.  
 Abr. 60,  
 64.—3 Mod.  
 165.—Ld.  
 Raym. 341.

§ 1. Such pleas are not cause of demurrer if matter of law be mixed in them. Pleas amounting to the general issue are only facts on which the issue may be turned in evidence. If the defendant plead any facts, which if found true, leave no colour of action in the plt., or right of action, it amounts to the general issue. Such a plea in fact, denies the whole charge or declaration. It is a settled distinction that matter of law must be referred to the court by special pleading; and matter of evidence to the jury, so given in evidence on the general issue.

6 Mod. 262.—  
 Cro. Car. 157.  
 —10 Co. 96,  
 a.—Hob. 127.  
 —3 Mod. 165  
 to 167.—Ld.  
 Raym. 88,  
 341, 393, 869.

§ 2. If matters of fact be referred to the court, which ought to be referred to the jury, it is cause of *special* demurrer since the 27th of Eliz. c. 5, and of general demurrer before; as in an action of trover for divers loads of corn, the deft. made his title to it in a special plea, as tythes, severed. The plt. demurred, and shewed for cause of demurrer, that the plea amounted to the general issue of not guilty. The deft. attempted to maintain his plea as involving title to real estate, namely, tythes and title, pleaded as it were a confession of the possession in the plt., as a general bar in an action of trespass, and colour given; but the court said, that action comprehends title in it; and held, that a plea which amounts to the general issue, is bad on special demurrer.

4 Bac. 62, 64.

§ 3. One may confess and avoid by a special plea. Cro. El. 871; Salk. 344; 2 Mod. 279.

Cro. El. 262.—  
 Cro. Jam.  
 165, Johns v.  
 Williams.—  
 Cro. Jam.  
 319.

§ 4. In trover. Plea, sale in market overt; or in trespass, plea, property in a stranger or deft., such pleas amount to the general issue: so, a plea in trover, that the owner sold the goods to the defts., and then to the plt., and then that they came into the hands of the defts. Held, this plea amounted to the general issue, as it left no colour of action in the plt.; but otherwise, in replevin. 4 Bac. Abr. 61; 1 Ins. Cl. 303, b.

Salk. 394,  
 680.—3 Lev.  
 41.

§ 5. In *assumpsit*, a plea, that he performed all things on his part to be performed, amounts to the general issue; but in debt, the deft. may plead a release, because it admits the contract, which is a colour of action. If debt on a bond, the plea was proper. Sundry cases, Com. D. Pleader, E. 14.

4 Bac. Abr.  
 62.—4 Ed. III.  
 15.—Doct.  
 Pl. 20.

§ 6. In dower, plea, that the husband of the demandant was only tenant for life, remainder to his son in tail, is ill, as it amounts only to the general issue; as not seized as of dower.

§ 7. Trespass for taking a horse. Plea, that he was the horse of J. S. ; that the plt. took and impounded him, and that the deft. took him in replevin. Held, this plea amounted to the general issue ; for it does not admit even possession in the plt. ; for by the impounding, the horse is in the custody of the law, so no colour of legal right in the plt. : so, a plea in trespass, which denies any force, or denies any property in the plt., general or special, amounts to the general issue. Com. D. Pleader, E. 14.

CH. 178.  
Art. 5.

Salk. 394,  
Holler v.  
Bush.—5  
Mod. 252,  
253.—5 Bac.  
Abr. 197.

§ 8. *Assumpsit* on a bill of exchange. The deft. pleaded, that after the acceptance, he gave a bond in discharge of the bill. Plea held bad, on demurrer ; for it amounts to the general issue ; and he should have pleaded *non assumpsit*, and given the bond in evidence : so, where case was brought against a commoner for digging pits., the deft. justified, that he was owner of the soil and dug for coal, doing as little damage as he could, and that he left sufficient common. On demurrer to this plea, it was adjudged ill, as it amounted to the general issue. Trespass for a trespass in the county of A. Plea, that it was committed in the county of B. &c. is as it amounts to the general issue.

Com. D. Pl.  
E. 14.—5  
Mod. 314.  
4 Bac. Abr.  
63, 64.—  
Carth. 63.—  
Com. D.  
Pleader, E.  
14.—Sid. 106.  
—5 Bac. Abr.  
197.—Bro.  
Tres. pl. 19.

§ 9. Whatever denies any right of action in the plt., is in evidence on the general issue : as in trespass, *quare clausum fregit*, a lease for years denies any right in the plt. to have the action ; but a lease at will, which may be determined when either party pleases, does not wholly deny a right of action in the plt., but is only a license, and so must be pleaded.

5 Com. D.  
383.—5 Bac.  
Abr. 213, 214.  
—Stile, 355.

§ 10. But the gift of goods may be specially pleaded in an action of trespass, for a trespass in taking them ; for this, though a denial of the plt.'s. property, does not amount to the general issue. Trespass is brought by A B, for beating C, his servant, whereby the plt. lost his service. Plea, that the plt. did not lose this service of C, is bad, as it amounts to the general issue ; but the deft. may plead, that C was not the plt.'s. servant at the time. If one matter, which amounts to the general issue, be specially pleaded together with another matter which amounts to a justification or an excuse of the act complained of, the plea is good. Generally, if any circumstance may make an act, which generally is a trespass, lawful or excusable, this may be pleaded specially, if an action of trespass be brought.

Bro. Tres. pl.  
27.

5 Bac. Abr.  
197.

3 Lev. 40, 41.  
5 Bac. Abr.  
198.

§ 11. Though whatever denies any right or colour of action in the plt., in mere matter of *fact*, is to be given in evidence on the general issue ; yet there are mixed exceptions to this general rule, as where there is mixed in the matter, some law ; as where the deft. in a special plea, pleads facts,

Ch. 91, a 1,  
a. 4, 5, 6, 7.

CH. 178.  
Art. 5.



Salk. 637, 638.  
—Skin. 362.—  
2 Mod. 276.—  
Hob. 127.—  
Cro. El. 871.—  
1 Salk. 394.—  
Lut. 1492.

which, if true, leave no right or colour of action in the plt., yet in deciding on these facts, nice legal questions arise proper for the judges only to decide, and not for the jury. In this kind of pleading, stated in this article, often the deft. has the benefit of Holt's rule; that is, the deft. may either plead the general issue, or specially, according to the nature of his defence taken altogether; and so taken, involves both facts proper for a jury to decide on, and law proper for the judges to decide; and it is to be observed, when the deft. pleads a special plea, in justification or excuse, he must, by a clear rule of pleading, admit the facts proper for the jury to find on the general issue; then only, the law part of the case is left to be decided, and that by the judges. The cases are numerous in which the general issue, or a special plea, is good. As Hob. 127, 268; 4 Bac. Abr. 60 to 64; 5 Bac. Abr. 197, 198; Law's Pleading, 111, 112; 3 Bl. Com. 305 &c.; cases in Croke &c. cited in this article.

Cro. Car. 157.  
—10 Co. 88,  
b.—Cro. Jam.  
165, 319.—3  
Mod. 166,  
and cases.

§ 12. Another question has been often made, what course is to be taken if the deft. plead specially, when he has not the above election, but ought clearly to plead the general issue. It appears, as above, that before the 27th of Eliz. c. 5, such special plea was bad on general demurrer. Hence, the plt. might demur generally; and bad since the act, on special demurrer, stating the general issue should have been pleaded; and this must be law still. But in practice another course may be taken, and often may be best; that is, for the plt. to move the court that the general issue be entered, or that a *nil dicit* be entered, on the ground an improper plea is no plea. In some books it is said, the plt. cannot demur to a plea, amounting to the general issue; but the best authorities are otherwise, as may be seen in the cases before and after 27th Eliz. c. 5; and the practice clearly has been both ways—so to demur, or so to move the court. See many cases; 5 Bac. Abr. 197, 198; 4 Bac. Abr. 60, 64; 10 Co. 95; Cro. El. 146, 147; Bro. Tres. pl. 19, 34; Bro. Attaint, pl. 108; Tidd, 591, 599; Fort. 378; Com. D. Pleader, E. 14.

Com. D.  
Pleader, E.  
14, the cases  
above in this  
article.

Com. D.  
Pleader, E.  
15 &c.

§ 13. In fact, the court has a discretionary power in many cases, to allow the general issue to be pleaded, where by the ancient books, it was necessary to plead specially; and now to plead specially where the matter of the plea may be good in evidence, owing to the matter of defence being a mixture of law and fact. Generally, whenever a plea is by way of excuse or justification, it must be special, as a wrong is admitted, but for the matter of excuse or justification; and when a wrong or a colour of action is admitted to do it away, there is colourable grounds, at least, for the deft's pleading specially.

ART. 6. *Where special matter may be pleaded.*

§ 1. The general rule is, when the defence consists in matter of law, or in what makes the fact or deed lawful, or excusable, the deft. may, and often must, plead specially, and refer the matter of his defence to the court; as where the action lies, a license, release, &c. may be pleaded; but mere matter of fact produced by one party, and which may be traversed or denied directly by the other, must be referred to the jury, as in article 5.

§ 2. If one get my deed, by duress, per minas, or covin, I cannot plead *non est factum*, but must avoid it by special pleading: so, as to usurious and sheriff's bonds; for in each case it is my deed, such as it is, and on the face of it the plt. has a right of action. See Duress, Usury, &c.

§ 3. In trespass, and not guilty pleaded, a license is no evidence to a jury; for the jury is not competent to determine its legal effect or efficacy: so, in debt on a deed, a release is no evidence to a jury, for the same reason; though they prove there is no debt or trespass in being; for to refer the license or release to the jury, is to refer either to an improper jurisdiction: so, the surrender of a lease accepted, pleaded. 3 Cl. Inst. 212.

§ 4. Term assigned and rent accepted of the assignee, pleaded: so, an acquittance pleaded in discharge of a writing obligatory. 3 Inst. Cl. 201, 202. So, if one justify by process out of an inferior court, he must plead specially, and shew in what action &c., that it may appear that the inferior court had jurisdiction.

§ 5. Whenever the deft. claims an *easement* in the plt's. soil, he must plead it specially. See Ch. 19, a. 2, s. 16: so, a highway must be specially pleaded in trespass, *quare clausum fregit*. Com. D. Pleader, E. 15: so, special matter must be specially answered. E. 16.

§ 6. *If a man act by special authority, he must plead it, &c.*; as if one be authorized to do an act by warrant or other special authority, he must plead it specially; as in trespass, if the deft. justify as sheriff's bailiff, he must plead and shew his warrant. Ld. Ray. 319, 310; Stra. 509, 710, 711, 1184; Cro. El. 698, 748. A bailiff cannot take a forfeiture or penalty ex officio; there must be a precept directed to him for the purpose, which he must shew in special pleading, and it is not sufficient to say he took it *per mandatum* &c.; and the officer must shew in his plea, he has in substance pursued his authority; and where the law requires a writ to be returned, he in his plea must shew it was returned. Cowp. 18, 22; see Ch. 75, a. 4, s. 12; 3 D. & E. 183: see Ch. 172, a. 9, s. 7; Ch. 91, a 3, s. 4, 5, 6.

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Art. 6.

Salk. 287, 580.

—Hob. 174.—

4 Bac. Abr.

60.—5 Bac.

Abr. 214.—

Com. D.

Pleader, E.

15 &amp;c.

Hob. 72, 166:

—Com. D.

Pleader, E.

15, 16, &amp;c.

Salk. 344.—2

Mod. 274,

278, cases

there cited.

3 Inst. Cl.

214.

Com. D.

Pleader, E.

15.

2 Wils. 173.—

Barnes, 448

Co. L. 283, a.—

3 Mod. 138.—

4 Mod. 378

4 Mod. 377,

378.—Salk.

108.—Co. L.

303.

5 Co. 90.

CH. 178.

Art. 6.

Co. L. 303, a.  
Co. L. 303, b.  
Cro. Car. 571.  
—Gil. L. E.  
274.

§ 7. When a matter of record is the foundation or substance of a plea or defence, it must be correctly, and with certainty, pleaded specially : so, the commencement of a particular estate, must be specially pleaded and shewn, as an estate for life. Cro. El. 153, 154 : so, the commencement of an estate in tail, generally must be specially pleaded and shewn, especially in bar. *Quære*, as to the declaration ; and Jones, 453 ; cases, Salk. 278 ; Hob. 127 ; 4 Bac. Abr. 60, 64 ; 1 Esp. 169 to 179.

1 Esp. 148.—  
Carth. 387.—  
Salk. 278.—  
Cro. El. 329.

§ 8. A further rule,—matter of law which does not go to the gist of the action, but to the discharge of it, even in the new framed actions, as *assumpsit &c.*, are to be pleaded as the statute of limitations : so, a lesser sum paid before the time of payment fixed by the contract, as accord and satisfaction, because that is not a performance that destroys the being of the action, but a collateral agreement that destroys the performance of it. Trespass for breaking the plt's. close and carrying away certain beasts there being : The deft. pleaded, that they were in his own ground, and that J. S. took them by wrong, and put them into the plt's. close by his consent ; for which finding them there, did take them &c., as it was lawful for him &c. The plt. demurred to the plea. The plt. argued that the deft. could not enter the plt's. close to take them out, except they were put there by the plt's. wrong or tort ; and that this plea amounted to the general issue ; for he cannot traverse the property of the goods. But the court held the plea good ; for the plt. by his declaration, doth not aver the property of the goods to be in him, but saith only certain beasts ; and when the deft's. beasts are taken from him by wrong, and are not out of his possession by his own delivery, he may justify taking them in any place in which he finds them. Plea good, and judgment for the deft.

Hob. 127

§ 9. *Special administration may be pleaded* ; as in debt against the deft. as administrator, he pleaded, that the intestate was indebted to him by bond £60, and goods to that value, and *non ultra*, came to his hands, which he detains for his debt, and that he had nothing *ultra*. The plt. demurred, because it amounted to the general issue of fully administered ; “but the better opinion,” says Hobert, “was, that this is no cause of demurrer ; for the plea is sufficient ; and besides, it is some matter in law, which hath been allowed always to be pleaded specially, and not left to a jury ; and the reason of pressing the general issue is not for the insufficiency of the plea, but not to make long records, when there is no cause, which is matter of discretion ; and therefore it is to be moved to the court, and not to be demurred

upon." See 10 Co. 95, and other cases ; may be demurred to. A *pleinement administer special* was in this case allowed to be pleaded specially. Held, on demurrer, there was legal matter in the defence, proper to be decided by the judges.

Ch. 178.

Art. 8.

Hob. 218.

ART. 7. *Pleas proper to each kind of action.*

§ 1. It is a well settled rule, that one's plea must always be proper for his case. The general issue framed for such kind of action must be pleaded whenever a general issue is pleaded ; as never *bailiff &c.* in account.

§ 2. In *assumpsit* the general issue is, *never promised*. This now is the only general issue in *assumpsit*, though formerly *not guilty* was sometimes pleaded in this action. See proper pleas in *assumpsit*, in many cases, Ch. 9, §c. &c.

§ 3. There can be but one plea to one entire promise. It must be denied *in toto* ; or *in toto* confessed and avoided ; or, as one entire indivisible promise or contract, it must be discharged by the same single plea.

§ 4. If several sums be sued for, and plea *one debt*, and then payment of that debt pleaded, the plea is good.

§ 5. In *assumpsit* for a minister's salary, the deft. may plead *non assumpsit* ; and this is a proper plea on which to prove he has forfeited his right to his salary. Ch. 48, s. 24 ; and a jury may try the forfeiture for his immoral conduct. *Id.* This has been the practice in Massachusetts ; but does not seem to consist, altogether, with the general principles of law. It will be observed, Ch. 48, *Fuller v. Princeton*, the court was of opinion his moral misconduct in his ministerial office, was not to be tried in a court of law ; and when *non assumpsit* is pleaded, and no facts or charges filed, he has no regular notice his moral misconduct is to be tried, previously to the cause being opened to the jury.

Ch. 48, s. 8  
10, &c.

ART. 8. *Proper plea in account.* § 1. The general issue is never *bailiff* or never *receiver*. It is a good plea for the deft. to say, he accounted before auditors ; Hob. 36 : and the replication may be, he did not account ; Ras. Ent. 17 ; 5 Ins. Cl. 144 : so that he accounted with the plt. ; Ras. Ent. 17 : so, as to part, not *bailiff* ; as to part, not *receiver* ; Ras. Ent. 18 : so, he received the money in payment ; Ras. Ent. 20. If the deft. plead never *receiver*, he cannot give a release in evidence, or bailment to deliver to B, and that he has delivered accordingly. Plea, that he accounted before R. and W., evidence he accounted before R. only, is sufficient, for the account is the substance ; Bul. N. P. 127. Deft. cannot, in this action, pay money into court as he may in *assumpsit* ; 128 ; and see Pleadings &c. in Account, Ch. 8.

*Audita querela. Forms.*  
see 1 Went.  
Plead. p. 81  
to 84.—Several matters.  
Bohun, 114  
to 129,

§ 2. Fully accounted, and a release alone, admit the deft. to be accountable, and which can be pleaded in bar of the

3 Wils. 113

CH. 178.

Art. 10.

Raym. 57,  
Southcot v.  
Rider.—2  
Burr. 1086.—  
1 Lut. 63.

action. These are allowed because they wholly extinguish the right of action, being matters for the court to judge of, they must be specially pleaded.

§ 3. If the plt. charge the deft. as receiver for a particular time, he must answer precisely to that time. The act of limitations is pleadable in this action, except in accounts between merchants: the auditor's account must include all articles to the time they end their accounts; per Lord Mansfield.

ART. 9. *Audita querela, pleas proper in.* See this subject considered, Ch. 186, art. 1, at large, in connexion with certain writs applicable to particular cases: there the various matters relating to *audita querela*, including pleadings therein intermixed, are sufficiently examined.

ART. 10. *Case in tort, proper pleas in.* § 1. In case for nonfeasance, negligence, misfeasance, malfeasance, defamation and libels, malicious prosecution, for deceit, for disturbance, escape, false return; in nuisance, trover, and waste, trespass on the case generally &c., the general issue is, not guilty; for an obvious reason, the plt. in all these and other cases of actions on the case grounded on *torts*, or tortious, deceitful, or even negligent acts or conduct, charges the deft. with acting negligently, deceitfully, fraudulently, or wrongfully, but not with force and arms; to all which charges the deft.'s proper general answer, plea, or denial, is not guilty of the charge made against him in the plt.'s declaration or complaint; see several heads and index.

§ 2. The deft.'s. special pleas in case on *torts*, are numerous, and will generally be found under each head to which applicable; as Ch. 58, General Principles, as to Case or Trespass; Ch. 59, Case on *Torts*, against one for the acts of his agents, apprentices, servants, &c.; Ch. 60, as to Bastard Children; Ch. 61, Copy Rights; Ch. 62, Deceits; Ch. 63, Defamation and Libels; Ch. 64, Disturbance; Ch. 65, Escapes, False Returns and Rescue; Ch. 66, Fences; Ch. 67, Ferries; Ch. 68, Fisheries, Flats, and Rivers; Ch. 69, as to Lands, Ancient Lights, &c.; Ch. 70, Malicious Prosecutions; Ch. 71, as to Lands Flowed, Mills, Mill Streams, Water Courses, and Watering Places; Ch. 72, Misfeasance, and Malfeasance; Ch. 73, for Negligence; Ch. 74, Nuisances; Ch. 75, Officers and Offices; Ch. 76, Property Special, as by Accession, in Banks, Bridges, Canals and Roads, in Bottomry, &c., Confusion of Goods, in Emblements, found as derelict, Estrays, Wrecks, Treasure Trove, &c., incident, as Fixtures, &c., *Feræ Naturæ*, in Succession, in Tolls; Ch. 77, Trover; Ch. 78, Waste; and Ch. 79, Ways. In each of these branches of case on *torts*, a sufficient number of pleas

will be found in their proper places, it having been a rule in considering the cases, to notice the pleadings in them whenever deserving of attention.

§ 3. *Proper manner of pleading in a justice court &c.* Technical nicety or form is not required in his court in New York. It is sufficient if the plt. state his case, so, that connected with the proofs, it appears he is entitled to recover : as where a plt. declared on a *lost note*, promissory note, payable on demand, and alleged it has been lost or destroyed ; and proves the existence and contents of it : and it not appearing it was negotiable, or if so, that it had been negotiated in fact. Judgment for the plt. for \$50, the extent of the justice's jurisdiction ; the reasons, the pleadings are usually by parol and by the parties themselves.

Sundry cases of pleadings before a justice in New York ; 10 Johns. R. 106, *in error on certiorari* ; 110, a set-off ; 111, held, the deft. cannot shew in evidence a former trial and judgment between the same parties, unless he has pleaded it, or *given notice* of the matter on joining issue ; by this case he may give it in evidence on such notice. A justice can no more try title to lands in New York, than one can in Massachusetts, and is by a plea of title prevented proceeding. It seems all other special matter are evidence on the general issue, if notice of them be given by the deft. on pleading it. It is a good rule thus to require notice.

§ 4. *In error on certiorari* from a justice's court : B. sued W. before a justice, by a warrant taken out on his own oath, declared for work and labour &c. Held, a prior suit by the deft. against the plt. before a justice, being a good plea in bar under the statute, it makes no difference whether such suit was commenced by a *summons* or *warrant*, for the plt. should have set-off his demand in the action brought against him ; other cases 10 Johns. R. 239, 240.

ART. 11. *In covenant, pleas proper in.* § 1. Pleas applicable to this action are numerous ; some peculiar to it and some not. The general issue in covenant depends somewhat on the declaration. If the plt. charge the deft. in it with breaking his covenant, he pleads the general issue by saying, *he has not broken his covenant aforesaid*, in manner and form as plt. complains, *de hoc ponit* ; but if the plt. alleges in his declaration that the deft. has not kept his covenant, general issue is, that he has kept his said covenant &c., or sometimes more particularly ; thus *actio non*, because, the deft. says, that he, after the signing and making the indenture aforesaid, to the day of suing out his writ, fulfilled, performed, and kept all and singular the covenants, grants, payments, articles and agreements on his part to be performed,

CH. 178.  
Art. 11.

10 Johns. R.  
104, 105,  
Pintard v.  
Tackington.  
—How alter-  
ing his execu-  
tion is  
void or not,  
10 Johns. R.  
405.—15  
Johns. R.  
247, Burdick  
v. Green.

10 Johns. R.  
246.—9  
Johns. R. 75.

10 Johns. R.  
238, Went-  
worth v. Bur-  
num.—1  
Johns. R.  
283, Doug-  
lass v. Hoag.

Strictly not  
a general  
issue.

3 Ins. C.  
461.

CH. 178.  
Art 11.

3 Ins. Cl.  
463.

Ch. 121, a.  
2, s. 16.

3 Inst. Cl.  
464.

3 Inst. Cl.  
464.

3 Inst. Cl.  
464.—Bro.  
Red. 149.

Rast. Ent.  
134.—3 Inst.  
Cl. 472.

3 Inst. Cl.  
477.

3 Inst. Cl.  
481.

3 Inst. Cl.  
482.

3 Inst. Cl.  
157.

3 Inst. Cl.  
492.—1 Saun.  
45, 49.

3 Inst. Cl.  
507.—Bro.  
127.

3 Inst. Cl.  
508.

3 Inst. Cl.  
508.

fulfilled, and kept, according to the form and effect of the indenture aforesaid, *hoc paratus* &c.

§ 2. There are many pleas in covenant more special, which state and aver special performance in the words or substance of the deed or covenant sued ; as that the deft. for ten weeks provided for said six horses, good and sufficient hay, and also good and sufficient oats, with sufficient straw, according to the form and effect of the indenture aforesaid ; *to wit*, at —, and of this puts himself &c. *Quære*, if this *de hoc ponit* be right.

§ 3. So, he pleads a release, and says the plt. after making the indenture sued upon ; *to wit*, at — on — by his certain writing of release, (produced in court,) dated — released to the deft. all actions, the tenor of which writing of release follows in these words, “ know” &c., and this he is ready &c.

§ 4. So, an apprentice, deft. pleads he offered to serve, and that his master refused : long plea ; *hoc paratus*.

§ 5. So, the deft. pleads he demised a house to the plt. in satisfaction of damages &c., *hoc paratus*. Replication, did not demise &c., and offers issue.

§ 6. So, the deft. pleads he offered to deliver fruit &c., according to the tenor and effect of the said indenture &c., *hoc paratus*, (long plea) and replication and issue.

§ 7. So, the deft. pleads and answers to each particular, and issue on each, offered on his part, in his plea, as to waste in buildings.

§ 8. So the deft. protesting the plt. had no title, for plea, says, he did not eject, expel or remove the plt. from the possession and occupation of the tenements aforesaid, as the plt. above complains, *hoc paratus*. Replication, did eject &c., and offers issue.

§ 9. So, the deft. pleads he performed his covenant to such a time, and afterwards the plt. ejected him &c. &c., *hoc paratus*.

So, the deft. confessed a part of the rent was due, and as to the rest assigned over, *hoc paratus*.

§ 10. So, the deft. pleads he spent the monies in repairs of the leased premises, *hoc paratus*. Demurrer and plea ill, for not shewing what those necessary charges were.

§ 11. So the deft. protested the ship was not sound ; for plea, said, the Spaniards did not attack her &c. and offered issue.

§ 12. So, plea, the ship did not depart with the first fair wind, as she might have done, *hoc paratus*.

§ 13. So, plea, the deft. was ready to account after the return of the ship &c., *hoc paratus*.

§ 14. So, the deft. pleaded that the plt. had nothing in the tenements &c., demised, as supposed, *hoc paratus* &c. 4 Ins. Cl. 95. CH. 178.  
Art. 11.

§ 15. So, plea by deft. that he did not grant the annuity demanded, and offered issue. 4 Ins. Cl. 97.

§ 16. So, the deft. pleaded as to part of the rent not in arrear, and as to part levied by distress. Issue offered as to arrears, *hoc paratus*, as to the distress, replication, denying the distress, and offering issue. 4 Ins. Cl. 98.

§ 17. So, the deft. pleaded that the plt. expelled him from the leased premises, *hoc paratus*. Replication, saying the plt. did not enter and expel the deft., and issue offered. 4 Inst. Cl. 100.

§ 18. So, the deft. pleaded nothing passed of the tenements into the possession of the deft. by the said writing; and *hoc paratus*; and replication, the tenements did pass into the deft's. possession by said writing, and issue offered. 4 Ins. Cl. 107.

§ 19. These are some of the pleas most common in covenant; also many pleas in covenant will be found in the preceding chapters, treating of the action of covenant, from Ch. 101 to 124; as Ch. 101, General Principles, Covenant lies or not, Covenant in Law, Rules of Construction; Ch. 102, Indentures of Apprenticeship; Ch. 103, Charter-Parties; Ch. 106, Covenants binding on Heirs, Executors, Administrators, Wives, Assignees, &c.; Ch. 107, Covenants joint and several &c.; Ch. 111, Principles, Conditions, and Defeasances; Ch. 112, Mortgages; Ch. 115, Covenant of Seizin, of Right, of Warranty, and as to Incumbrances; Ch. 116, Quiet Enjoyment, and Save Harmless; Ch. 117, Covenants to Repair and Pay Rent, Mutual and Independent, &c.; Ch. 119, Covenant lying in; Ch. 120, What is a Breach of Covenant &c. how assigned, &c.; Ch. 121, Pleadings in Covenants by Defts.; Ch. 123, Pleas in Covenants on Several Heads; Ch. 124, Voucher, Voucher and Rebutter; as to Estates, Ch. 125 to 136, especially in dower, held by aliens, forfeiture, &c.

§ 20. In debt on bonds conditioned for performance of covenants; several forms of pleas thereto. 2 Ch. on Pl. 481 to 487.

Where all the covenants, &c. in the bond, are affirmative and not negative, nor disjunctive, or alternative, deft. may plead performance.

§ 21. This was an action of covenant on a policy under seal, made in Alexandria under Virginia law; and held, 1. All special matter of defence must be pleaded: 2. Under the plea of covenants performed, the deft. cannot give evidence which goes to vacate the policy. The evidence offered was such as went to prove the policy was obtained by the assured by fraud and misrepresentation, as to the built, age, and value of the

6 Cranch,  
206, 221,  
Marine Ins.  
Co. & al. v.  
Hodgson.

CH. 178.  
Art. 12.



vessel insured. After the first writ of error and the cause remanded, this matter was pleaded in a ninth plea; but being too late, the plea was rejected by the court below. The court above on the second writ of error, considered the rejection altogether a matter in the discretion of the lower court: 3. To prove a vessel condemned the libel and sentence are sufficient: 4. The depositions stated in the case abroad, are not evidence in an action on the policy: 5. Nor in it can the insurer prove by parol, other value than that in the valued policy.

ART. 12. *In debt, pleas proper in.*

See Ch. 42.  
—Forms 2,  
Ch. on Pl.  
459, 498.

§ 1. The general issue is *nil debet*, or does not owe. Very numerous are the pleas in the books, applicable to the action of debt, and many of them peculiar to it; among which are the following, *nil debet, qui tam*. 2 Ch. on Pl. 459.

4 Ins. Cl. 364.

§ 2. The deft's. plea of payment at the day and place according to the condition, *hoc paratus*; and replication, did not pay.

4 Ins. Cl. 368.

§ 3. So, plea, payment of all sums mentioned in the condition of the bond; *hoc paratus*. Replication, protesting no payment, did not pay £1; and rejoinder, payment, &c.

4 Ins. Cl. 373.  
—Rol. Ent.  
221.

§ 4. So, plea of payment by a surety of two bonds on oyer. Plea to each; and each, *hoc paratus*. Replication, and issue to each.

4 Ins. Cl.  
379, 391.

§ 5. So, deft's. plea, that the day of payment is not come &c.; *hoc paratus*. As to part payment; replication, no payment &c., and issue offered. Thomp. 434; 1 Lutw. 465, 466.

3 Lev. R. 55.  
—4 Ins. Cl.  
391.

§ 6. Plea, after the day the plt. accepted another bond in discharge &c. Held, not a good plea: so, plea, the obligee had accepted the executor's bond in lieu of the testator's. Held, no discharge of his bond. 1 Bac. Abr. 23. Nor one by a stranger with sureties, unless to pay at an earlier day. 4 Inst. Cl. 412.

4 Ins. Cl.  
409.—5 D. &  
E. 513.

§ 7 So, plea of payment &c., and proof of payment to the obligee's attorney, or agent, holding the bond, even after judgment, is a good plea. Where *nil debet* is a good plea. 2 Ch. on Pl. 460.

4 Ins. Cl. 383.

§ 8. So, the deft. pleaded he delivered wheat, and paid 20s., according to his deed at —; *hoc paratus*. Replication, protesting he did not pay the plt. the 20s. at —, as alleged by the deft.; for plea, the deft. did not deliver the said quarters of wheat to the plt. &c., and offered issue.

4 Ins. Cl. 392.

§ 9. So, the deft. pleaded, wheat was paid and accepted in satisfaction, and paid also £4. Was debt on a bond of £20, conditioned to pay £10; *hoc paratus*. Replication, did not pay said £4, on —, or deliver said wheat by protest-

ando; for plea, did not accept said two quarters of wheat &c., and offered issue. N. B. This was debt as above. Deft's. first plea, paid £4, and accord &c. for £6, and verified. The plt. divided the plea, and offered two issues. And Co. L. 71. CH. 178.  
Art. 12.

§ 10. So, the deft. comes and defends &c., and prays oyer of the said obligation, and it is read to him, and thereupon he confesses the forfeiture of it, and prays to be heard in equity; and that the said forfeiture may be chancered, and judgment for the first debt and damages.

§ 11. In debt on judgment, deft. comes and defends &c., when &c.; *actio non* &c., and says, there is no such record of the recovery of the damages aforesaid, against the said D, as the plt. has in his said declaration declared upon, and this he is ready to verify. Replication, plt. says, *precludi non*, because he says there is such a record as he above hath declared on, and this he is ready to verify by that record. *Nul tiel record*, is a good plea in debt upon an escape.

§ 12. Plea, the deft. performed the condition. Held, a condition to pay money may be discharged by a collateral thing, as wheat &c., accepted; but it is otherwise of a condition to do a collateral thing, as to make a feoffment &c. The debtor directs the application of the payment, where not agreed on. To pay on several days, no action lies till the last, but with special exceptions. Payment before the day is payment at it.

§ 13. So, the deft., the principal, pleaded, he saved his surety harmless, on oyer of the counterbond, and payment of the debt; *hoc paratus*. Replication, that he did not pay &c., and issue offered.

§ 14. So, the defts. plead, they saved the plts. harmless, generally, and kept them indemnified; *hoc paratus*. Long replication, shewing how bound, and how damnified &c.; *hoc paratus*. Rejoinder, that if the defts. had had notice of the plts' being damnified would have kept them indemnified. Had no notice &c.; *hoc paratus*. Plts. demurred. Judgment for them; for they had no need to give notice.

§ 15. *Awards*. So, the deft. pleaded, no award made, on oyer of the bond and condition to perform the award; *hoc paratus*. Long replication, stating the award made, and assigning a breach; *hoc paratus*. Rejoinder, no award made before the day &c., and offered issue.

§ 16. So, a plea by the deft., that the arbitrators had notice of a matter in dispute, and shewing what, and did not award thereon, so no award made by them or the umpire. Replication, the umpire made one. Rejoinder, revoked. Surrejoinder, did not revoke, and issue. A submission with-

Hob. 209.

4 Ins. Cl.  
410.—4 Bac.  
Abr. 87.—1  
Bur. 9.—Hob.  
68, 69.

4 Ins. Cl.  
413.—1 Leo.  
311.

4 Ins. Cl.  
423.—Brown.  
Red. 193.—  
Bro. Red.  
193, 257.

4 Ins. Cl. 130  
to 436.—1  
Saund. 114,  
117, 118.

Thomp. Ent.  
178.—5 Ins.  
Cl. 7.

6 Ins. Cl. 9,  
11, 13, 17, 21.

Ch. 178. out deed may be countermanded without deed, on giving  
 Art. 12. notice by the party : by deed, may be revoked by deed, but  
 the bond is forfeited. Deft. pleaded an award, and that he

5 Ins. Cl. 29,  
 30, 32, 33,  
 38, 39.

performed it. Plea, an award to pay to a stranger, and so bad and void. Award of a sum in satisfaction of all controversies is mutual and good. When on one side only, is void; and the true plea is, no award made. No award pleaded. Replication, a parol one. Replication, award ready to be delivered to deft.; none there to receive it. Rejoinder, not ready. Rejoinder, is a departure from the plea of no award. Replication, second umpire made an award. Rejoinder, he offered to pay and the plt. refused. When the award is made it is ready to be delivered. An award creates a duty that will go to the executor.

5 Ins. Cl.  
 63, 72.

5 Ins. Cl.  
 124, 125.

§ 17. *Escapes*. Long plea by the deft.; *fresh pursuit*; *hoc paratus*. Replication, that the deft. voluntarily permitted the prisoner to escape &c.; without this, that he retaken him in fresh pursuit, and put him in prison in execution for the debt &c.; *hoc paratus*. Rejoinder, did retake &c. in fresh pursuit, and put him in prison on execution for the debt &c.

5 Ins. Cl.  
 124.—Pl.  
 Gen. 237.—5  
 Ins. Cl. 130,  
 131, 133,  
 134.

§ 18. So, plea, he did not permit said J. to go at large out of his prison and custody, where he would in manner &c., and issue: so, plea, he brought the prisoner by *habeas corpus*, which is the same going at large. Replication, voluntarily permitted, and traverse of *habeas corpus*. Plea, he delivered said J. by *supersedeas*. Plea, he has said J. in custody, and traverses he permitted him to go at large, when he would. Replication, permitted him to go at large. Plea, he took J. for another cause, and not that in the plt's. declaration. Replication, for that in his declaration.

5 Ins. Cl. 137.

§ 19. Debt on *replevin* bond. Plea, that the condition is not according to the statute, and so void.

Bro. Red.  
 190.—5 Ins.  
 Cl. 45.

§ 20. So, long plea by the deft., that the plt. promised to give advice; *hoc paratus*. Replication, did not request it, and issue offered.

5 Ins. Cl. 149.

§ 21. So, the deft. pleaded he made a bond for securing payment of the said £10 to the plt.; *hoc paratus*. Replication, did not make the bond.

5 Ins. Cl. 161.

§ 22. Pleas, the deft. does not owe, or does not owe the king and plt., and offers issue.

5 Ins. Cl.  
 164, 165.

§ 23. So, plea, he did not commit perjury. Plea, he did not keep a gaming house. Lut. 133, 134. Plea, did not receive, and issue. 5 Ins. Cl. 186.

5 Ins. Cl.  
 188, 190.

§ 24. Debt for maintenance. Plea, he is an attorney. Plea, he did not sell the goods &c., against the form of the statute.

§ 25. So, in debt the deft. pleads *non est factum*. See *Non est factum*. CH. 178. Art. 12.

Debt on bond against the heirs of A. A gave B a bond conditioned that his heirs or executors in one year after his death should pay her or her executors £3,000, and then married her and died. In this action the deft. on *oyer*, pleaded, that after making the bond, January 10, 1782, "the said A took to wife and intermarried with the said B, the plt., and the plt. then and there became covert of, and wife to, the said A, obligor, and continued so until, and at, the death of the said obligor" &c. The plt. replied, "the bond aforesaid was made in contemplation of a marriage to be had and solemnized between the said plt. and the said obligor, and that with an intent, that in case that marriage should take effect, and the plt. should survive him, she should have the full benefit of the said bond. Replication, held good on demurrer." 5 D. & E., 831.

§ 26. So, the deft. pleads usury in bar, and corrupt agreement, shorter form. Also usury at great length; *hoc paratus*. 5 Ins. Cl. 298, 299, &c.; 1 Lut. 467. 5 Ins. Cl. 303

§ 27. In addition to these and many other pleas at large, in the books, besides abstracts of pleas, as in Bacon, Comyns, &c., reference may be here made to the large number of pleas in debt before stated at large, or in substance, from Ch. 139 to Ch. 170; more especially Ch. 139, as to the general principles of debt on contracts; Ch. 141, as to Debt on Awards; Ch. 144, Debt on Bonds; Ch. 146, Debt on Judgments; Ch. 148, Debt for Penalties, Statutes, *Qui Tam*, &c.; Debt on Probate Bonds, Ch. 149; Ch. 150, Debt on Recognizances and Bail; Ch. 151, Debt for Rent; Ch. 154, Pleas in Debt; Ch. 155, Accord and Satisfaction in Debt; Ch. 156, Acquittance in; Ch. 157, Discharges Pleaded in; Ch. 158, Pleas Duress and Per Minas; Ch. 159, Plea, Escrow; Ch. 160, Estoppels Pleaded; Ch. 161, Limitations Pleaded; Ch. 162, *Nil Debet—Non est Factum* Pleaded; Ch. 163, *Nul Tiel Record*—Pleas; Ch. 164; *Oyer*, 165, Payments Pleaded; Ch. 166, Matters of Record Pleaded in Bar; Ch. 167, Releases Pleaded; Ch. 168, Pleas—Set-Off; Ch. 169, Plea—Saved Harmless; Ch. 170; Pleas—Tender and Bringing Money into Court.

§ 28. In debt on a specialty, *non est factum* is also a good plea on *oyer*, where the deed is void. Form, 2 Ch. on Pl. 460 &c.; and whenever the deft. disputes it, he ought to use the term *writing*, or the "*supposed writing obligatory*." 10 Co. 120, 126. *Non est factum* pleaded to one count, and *nil debet* to three others. 2 Ch. on Pl. 462: so, *onerari non*. Id. Delivery as an escrow may be given in evidence on this plea, *non est factum*. 4 Esp. R. 255. Generally this plea ought to 1 Saund. 291, a. n. 1.—Lill. Ent. 166. 1 Saund. 290, —Rast. Ent. 161, b. 182, a.

CH. 178. conclude to the country. 1 Salk. 274; Lill. Ent. 186. First  
 Art. 13. plea, *non est factum*; second, deed obtained by *fraud*. Form  
 of the plea. 2 Ch. on Pl. 464. Fraud is a defence at law.  
 2 D. & E. 763; 3 D. & E. 438; and Ch. 1, a. 29, s. 2.

*Detinue*. This is an action scarcely ever in use in our  
 practice; four things are essential to support it: 1. Deft.  
 must come lawfully to the goods by delivery to him, or by  
 finding: 2. The plt. must have property in them: 3. The  
 goods themselves must be of value; and fourth they must be  
 identified.

2 Rol. R. Wherever trover lies, detinue does; and in detinue the plt.  
 447.—Cro. can only recover the goods themselves in specie.

El. 130. The pleas in this action, are the general issue, *nil detinet*.

ART. 13. *Pleas proper in dower*.

Bul. N. P. § 1. The general issue is, *ne usque seisie que dower*; may be  
 118.—Form as to part, and another plea as to another part, the residue.  
 Regu'r. Jud. If the tenant plead *ne usque seisie que dower*, the wife may  
 31, 50. give in evidence a release to her husband, or a surrender to  
 him by the other joint tenant &c.: so, if the demand be of  
 rent charge, she may give a grant of the rent in evidence,  
 and that her husband died the day before payment.

Buller, N. P. Father, tenant for life, remainder to the son in tail, re-  
 118.—Noy. mainder to the father in fee. The father and son were  
 64.—Cro. El. hanged out of the same cart, for felony. The father's widow  
 603. sued for dower, issue *ne usque seisie*. Proof by witnesses, the  
 father moved his feet after the son's death; and she recovered.

Story's *Plea usque seisie*. Deft. comes &c., *non dotem &c.*, because  
 Pleadings, the said A A, formerly her husband, neither on the day on  
 353. which the plt. espoused him, nor before, nor ever afterwards,  
 was seized of the tenements aforesaid, with the appurtenan-  
 ces of such an estate, as that the plt. could thereof be en-  
 dowed, and thereof puts &c. Like plea, 2 Wils. 118, 124;  
 354 & 355, like plea, Story's Pleadings; Ras. Ent. 230; 3 Ld. Ray.  
 356. 192; 6 Ent. 176, a.; Clift. 303.

§ 2. *Plea, never lawfully married*. Deft. comes &c., and *non*  
 2 Wils. 118, *dotem &c.*, because he says the plt. never was accoupled to  
 124.—Story's the said A B, deceased, in lawful matrimony; *hoc paratus &c.*  
 Pleadings. A marriage replied &c.: same case, Story's Pleadings, 353.  
 In England, the marriage must be tried by the bishop's cer-  
 tificate; but not if had in Scotland: same case, Bul. N. P.  
 118; and Story's Plead. 357, 358; and the court laid it  
 down as a fundamental rule, that if the trial cannot be by  
 certificate, it must be by the country. 2 H. Bl. 458, 162;  
 see Ch. 46, a. 5, s. 3. This rule applies in all cases in Mas-  
 sac'ussets and Maine, and in most of the United States.

§ 3. *Plea, that the husband is alive*. Deft. comes &c., *non*  
 Story's *dotem &c.*, because he says, that the said A A, is alive and in  
 Plead. 349.

full life, to wit, at —; *hoc paratus*. Replication, he is dead. Rast. Ent. 228. CH. 178.  
Art. 13.

§ 4. *Plea, a divorce in the case*. This is a plea that probably will not be often pleaded; for though by statutes cited, Ch. 46, divorces may be frequent *a vinculo*; as in fact they are, and the wife has dower when the husband is the guilty cause of the divorce; yet when the wife is the guilty cause, it is hardly probable she will often apply, as the evidence against her will always be a matter of record, shewing she is the guilty party, and so not entitled to dower, and then only will this plea apply. And 5 Com. D. Pleader, 2 Y. 12.

§ 5. *Plea, elopement*. Def. comes &c., *non dotem* &c., because he says, the plt. in the lifetime of the said A. A., of her own will, at —, left the said A. A., her husband, and eloped from him with one B. B., unto C &c., and there afterwards remained a long time, in adultery with the said B. B., to the end of the life of the said A. A.; without this, that the plt. was reconciled to the said A. A., her husband, in his lifetime; *hoc paratus* &c. She replied, she did not elope. A like plea in *Welman v. Nutting*, see Ch. 46, a. 8, s. 1. Rast. Ent. 230.—Cited Story's Pl. 352.—Co. L. 32.—Dy. 107. 2 Bro. Ent. 109.

§ 6. *Her release pleaded at large*. That the plt. released her right of dower in the premises by joining in a deed of mortgage with her husband, and afterwards the deft's. father recovered judgment against the husband, and levied execution on the equity of redemption, and the premises descended to the deft. On demurrer to this plea, judgment was for the deft. See this case, *Mortgage*, Ch. 112, a. 5, s. 1 &c. Another plea, the plt. joined with her husband, in a mortgage. Her replication, *non est factum*. See this case, *Dower*, Ch. 130, a. 4, s. 73; her direct release, 5 Com. D. Pleader; 2 Y. 17; must be to the tenant of the freehold, 2 Cro. 151. Story's Pl. 359, 360, 360 to 364.

§ 7. *Husband's lease before marriage, pleaded*. If the husband be neither seized in fact, or in law, during the marriage, his wife cannot have dower, therefore, if before the marriage, he, by his lease, part with the seizin, so that he is not seized in law or fact, during the marriage, this matter may be pleaded in bar, if his widow sue for dower. See *Dower*, Ch. 130, a. 4; *Salk.* 2911, *Lindsey v. Lindsey*. 2 Bac. Abr. 131, 139—6 Com. D. Pl. 2 Y. 15.

§ 8. *Detainer of charters, pleaded*. Def. comes &c., *non dotem* &c., and says that the husband was recently possessed of one sealed chest, with divers written charters and muniments concerning the said tenement, contained therein, to wit, at —, and died thereof possessed; so states his heir entered, and the chest &c. came to the hands of the plt., a request to her deliver to them &c., her refusal &c.; *hoc paratus* &c. She replied, no detainer &c. If on such replication, it is found against her, her dower is barred. *Hob.* 113; Story's Pl. 351.—From Rast. Ent. 229.—*Hob.* 199.—*Bul. N.* Pl 17, 118.—*Mod.* 18.—*Salk.* 252, 253.—*B. N.* P. 118.—*Bro.* *Dower*, 8.—*Salk.* 253.—*Hob.* 113.

CH. 178.  
Art. 13.



Salk. 252. When the tenant pleads this plea, he must shew what, and also allege he has always been ready to render dower, and yet is ready if the plt. will deliver the deeds. If she produce them on trial, she will recover; and if she be with child, she may keep them for him, and the heir for the time being cannot plead this plea. This cannot be pleaded after imparlance. This plea cannot be pleaded in dower against the feoffee. 9 C. 18; 11 H. VI. 4, or guardian; Co. L. 39, *Burdon v. Burdon*; Salk. 252.

Co. Ent. 171,  
b. 172.

Hob. 71,  
*Shirly v.*  
*Wood.*

§ 9. *A jointure may be pleaded in bar of dower*; and also, a jointure after marriage, to which she agrees after the death of her husband; and it is sufficient to plead a jointure generally, without saying she agreed; for it shall be intended, till it be alleged on her part, that she refused. She may reply, the estate was not made to such uses, or it was not for a jointure. Co. Ent. 172; Hob. 104.

Mass. S. J.  
Court, Essex,  
1794.—1 Bro.  
Ent. 205.

§ 10. *Tout temps prist, pleaded.* Deft. comes and says that from the time of the death of the husband of the plt. always hitherto, he, the deft. was, and yet is, ready to render to her her dower; *hoc paratus &c.*; without this, that the plt. demanded of the deft. to assign her reasonable dower in the premises, which he refused to do, as the plt. has declared: prays judgment if she ought to have damages, and for his costs. She replied, a demand. This plea is on Massachusetts act of March 11, 1784; noticed, Ch. 130, a. 4. Massachusetts Supreme Judicial Court, August, 1796, decided if no demand in fact, according to the act for assignment of dower, one month before the action is commenced, it must be pleaded in abatement. Co. L. 32, b; Lut. 715, 717; 2 Mod. Ca. 25.

2 Johns. R.  
484.

Rast. Ent.  
229.—5 Com.  
D. 2 Y. 15,  
Pleader.

§ 11. *Assignment of dower made, pleaded. Actio non &c.*, because he says, that he, since the death of the husband &c. assigned to the plt. ten acres of land, with the appurtenances, of the thirty acres of land, to be holden by the plt. for the term of her life, in the name of dower of her the plt. which belonged to her of the said thirty acres of land; to which assignment the plt. agreed; *hoc paratus*. Her replication, the deft. did not assign dower: so, plea, rent was assigned, or an annuity, for dower: so, plea, her husband devised to her lands in lieu of dower, which she accepted. 5 Com. D. Pleader; 2 Y. 15: so, twenty acres of wheat, common of pasture or other profit out of the land was assigned. Assignment by the husband's executor is no plea. Mod. 26. He who assigns dower must have a sufficient estate &c. 2 Leo. 10: and the assignment must be absolute, and not on condition. Cro. El. 452.

Cro. El. 451.  
—Story's Pl.  
358.—Mo. 59.

§ 12. *There may be a view in dower*, as in other real actions.

On Massachusetts act of June 26, 1784, section 9, which allows a view by the jury in all causes relating to the realty. CH. 178.  
Art. 13.  
And 5 Com. D. Pr.; 2 Y. 3; Co. Ent. 177 a.: Except in England. 2 Inst. 481; 3 Lev. 169.

§ 13. *So, there may be voucher in dower claimed &c.* On the general principles on which tenants may vouch to their assistance, those who can strengthen their defence. See Voucher, Ch. 124. The tenant may vouch the heir; Com. D. Pleader; 2 Y. 18.

§ 14. A release pleaded is of no effect if there be no privity between the parties. This rule is founded on general principles. See Releases; but where there is a privity, a release of dower by the plt. or widow to the tenant of the freehold, is valid. Com. D. Pleader; 2 Y. 17. 11 Mass. R.  
208.

§ 15. *Disseizin made by the plt., pleaded. Actio non,* because the deft. says the plt. after her husband's death, and before the purchase of her writ, entered into the same three acres of pasture, and unjustly disseized the plt. thereof, without judgment, and is yet seized thereof in her demesne, as of fee, by disseizin &c.; *hoc paratus &c.* Replication, the plt. did not disseize the deft. Rast. Ent.  
231.—Cited  
Story's Pl.  
250.

§ 16. *Dower lies only against the tenant of the freehold or inheritance; hence, the deft. may plead he is not such tenant, in abatement.* He says, he cannot render dower, because he is not tenant as of the freehold of &c.; nor was he on the day of suing out the plt's. writ: prays judgment it may be quashed. Replication, tenant of the freehold. In another such plea, stated who was such tenant. This is also considered the true construction of our statute respecting dower, though it speaks of the action of dower brought "against the tenant in possession;" "or such persons, who have or claim right or inheritance in the same estate." Action against two, as to part sole tenure. *Parker v. Murphy.* Comp. Attor.  
207.—Story's  
Pleadings,  
354.

§ 17. *To a demand of dower, it is no plea, partition has been made among the heirs.* Before dower is assigned to the widow she holds no part of the land, she is neither sole seized of the whole or of any part; the heirs are seized of the land, and entitled to hold the whole, until her dower is legally assigned; hence, she has no interest in a partition they make before her dower is so assigned; nor is she bound by such partition. Mass. act,  
March 11,  
1784.—12  
Mass. R. 485.  
3 Morg. 466.

§ 18. *Commissioners to assign dower need not be freeholders of the county. Must be a third of the income.* That is, in appointing the judge of probate is not confined to the freeholders of the county where the husband last resided. There is no statute directing him so to appoint them; but the sheriff must appoint, in assigning dower, freeholders of the

CH. 178. county where the land lies. The judge correctly appointed  
 Art. 14. commissioners in Machias, and others in Boston. As to the income, see Leonard v. Leonard, 4 Mass. R. 533. In Miller's case, the intestate last dwelt in Boston, and left lands in Machias.

Story's  
 Pleadings,  
 364, A. D.  
 1773, plead-  
 ed.

§ 19. *Dos de dote, pleaded. Actio non &c.*, because the deft. says one A, who was the wife of B, late of &c., deceased, during all the lifetime of the plt's. husband, and until after his death, and until after the purchase of the writ aforesaid, did claim to hold, and did in fact hold, possess, and enjoy her right of dower of all and singular, (the premises) mentioned in the plt's. writ, all which were in the seizin and possession of the said B, father of the plt's. husband, and of all which the said father was seized in his demesne as of fee, during the coverture; and of one third part thereof, the said A was legally endowed, after his death, and during all the coverture of the plt. and her husband; ready to verify &c. The doctrine of *dos de dote* was early adopted in Massachusetts and Maine, from the English law, and on the principles of that law.

ART. 14. *Pleas proper in ejectment.*

See Ch. 91, a.  
 6, our former  
 vague use of  
 ejectment.—  
 Forms of de-  
 claring, 2 Ch.  
 on Pl. 392 to  
 484, and  
 notes.—1  
 Cruise, 243,  
 503.—2  
 Cruise, 69,  
 229, 233.

§ 1. Ejectment, according to the modern English practice, is not much used in New England, especially in Massachusetts. Still, however, even here an action of ejectment, or an action in which the deft. is called on to answer the plt. in a plea of ejectment, is sometimes brought, especially in order for the mortgagee. or his assignees, to get possession of estates mortgaged, as will be seen in many forms in American Precedents, (head of Real Actions,) made by Trowbridge, Read, Pratt, Thatcher, R. Dana, and others; but on attending to these forms, and the proceedings thereon, it will be observed that the deft. might just as well be called upon to answer in a plea of land; for each declaration states the plt's. or demandant's title as he expects to prove it, and there is nothing of fiction in the case, no confession of lease, entry, and ouster, a part so essential in the English practice, and in New York, and other states which have adopted that practice. Prior to the year 1786, or thereabouts, in almost all actions brought in Massachusetts, to recover possession, or seizin and possession of lands, the deft. or tenant was summoned to answer in a plea of ejectment, even in the case of a mere right, as in Beckford & ux. v. Ellis or Ober & al. &c., wherein the mere right was demanded and tried, and in which, on the part of the demandants the right of entry had been gone above thirty years. In fact, the plea of ejectment was a mere form of expression, to which very generally of late years has been substituted the expression, *plea of land*; nor

It is the pri-  
 ority of inter-  
 est and the  
 receipt of  
 rent that  
 makes the  
 landlord;  
 Coleman, 66.

was much regard paid to the principal object of this action, called *ejectment*, whether it was to disprove the deft's. claim or title, or his tortious entry, or to establish the demandant's title, or right, or claim. Gentlemen of the bar in this State, several years since, as they came to be more attentive and accurate in pleading, observed this word *ejectment* was used in a very loose manner; therefore, Trowbridge was led to observe, that an "action of *ejectment* may be brought in most cases; that our writs of *ejectment* are in the nature of real actions, and comprehended all those of the ancient common law, the writ of right, the writ of assize, the writ of entry, in their various degrees and several distinctions in point of form" &c. "The demandant in *ejectment* may declare on mere right, which is in the nature of a writ of right; on a gift in tail, which is in the nature of a *formedon*, whether in *descender*, remainder, or reverter," &c., &c. In fact, lawyers observed that our *ejectment* included almost every species of real actions; and the general issue in it, almost invariably was, not guilty, even in a writ of right, in Essex and some other counties in the State, till about the year 1803.

Attentive lawyers naturally noticed that *ejectment*, in its origin, was an action brought by one who had a lease for years, to get redress for an injury done him by dispossession. The declaration in this action, supposed only a term for years in the plt., and the judgment was to recover the term. Ouster or dispossession of one from an estate for years, is a kind of disseizin, eviction or turning out the tenant from the occupation of the land, during the continuance of his term; and for this injury the law provided two remedies, *ejectione firmæ* and *quare ejcit infra terminum*. In these, possession and damages, said Blackstone, are recovered. A writ of *ejectione firmæ* lies where lands are let for a term of years, and afterwards the lessor, reversioner, remainderman, or any stranger ejects or ousts the lessee of his term; and in this he recovers back his term, or the remainder of it, with damages. Thus limited was the ancient use of this action, only a remedy to recover the term of lessee for years and damages. It has been as much extended in England, New York, &c. in modern times as in Massachusetts, but in a very different manner. In England, Blackstone observed, the title to land is now usually tried upon an action of *ejectment* and trespass, writs of entry, assize, *formedon*, writs of right, &c., have been but little used for a century past. Their forms, indeed, are preserved in the practice of common recoveries. In order to convert this action into a method to try titles to freeholds, it became necessary the claimant should take possession of the lands, to empower him to make

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A mortgagee out of possession may be let in to defend in *ejectment*; id. 57. —So a claimant of title to unlocated lands; id. 82.

American Precedents, 288, 290.

Enough to demand seizin and possession in the beginning of a declaration without doing it in the close; 1 Day's Ca. in E. 134, 136.—5 Cruise, 239, 512.—

3 Bl. Com. 201.—

3 Bl. Com. 199.—Original use of *ejectment*.—Bohun, 264 to 270.—A few forms &c., and of the agreement, modern use, and manner of proceeding.

3 Bl. Com. 197, 201 to 207.

CH. 178. the lessee for years, who could be capable of being dispossessed; such claimant having a right of entry, makes a formal entry on the lands, and there being in possession, seals and delivers a lease to a third person for years, and then leaves the lessee in possession, who remains there till some one enters afresh, and ousts him, or turns him out; for this ouster or ejection the lessee is entitled to this action against the tenant or casual ejector, whichever it was that ousted him, to recover back his term and damages, and where against the casual ejector notice must be given to the tenant of the land. To recover in this action, the plt. must prove, 1st, good title in his lessor, which brings the right entirely before the court: 2. That the lessor (the real claimant) being seized by force of such title of the land, did lease them to the plt.: 3. That plt. being lessee did enter and take possession by force of such lease: 4. That the deft. ousted him. This must still be pursued where the land is vacant, except the notice to the tenant; but now no lease is made, no entry by the plt., and no ouster by the deft.; but these are supposed and confessed. Notice is given to the real tenant to defend, and the title merely is tried. If he do not appear and defend, on judgment against the casual ejector, and on execution, he is turned out by the sheriff. As ejectment lies only for *corporeal* hereditaments, the term *tenement* is improper, as it includes *incorporeal* estates. 2 Bl. Com. 17; 1 East, 441; Vice v. Burton, 2 Stra. 891; but 2 Saund. 44; Runn. Eject. 129; 1 Burr. 623. The tenant must give notice to his landlord, who by leave of the court, may be made co-defendant. Since the title is tried in this action, the damages are usually a shilling, or some trifle; and after recovery in ejectment, the plt. or lessor may bring trespass to recover the *mesne profits*, against the tenant in possession, who wrongfully received them. The ancient judgment was to recover the term and damages; or damages only, where the term had expired. "This writ is calculated to try the mere possessory title to the estate;" and has succeeded to the actions of assize; but ejectment lies not of those things whereon an entry in fact cannot be made, as of an *incorporeal hereditament*, except when appendant &c. to lands recovered; for where no entry can in fact be made, it shall not be supposed by fiction. Nor will it lie where the entry of him who has the right is taken away by descent, discontinuance, twenty years dispossession, &c.; and if the termor be ousted by A, and another come into possession, under A, the termor or lessee ousted, shall have *quare ejecit infra terminum* against such other person, by Westmin. 2, 24; but the right of entry may be in fee, in tail, for life, or years.

2 Esp. 221.—  
Hob. 5.—Cro.  
Car. 202.—  
Cro. Jac. 146,  
150.—Co.  
L. 5, 9.—  
Stra. 64.—  
Andr. 107.—  
1 D. & E. 364.  
—Yelv. 143.—  
Cro. Car. 492.  
—2 Selw. 617.

§ 2. Where the title of the plt. in ejectment is ended, see *England v. Slade*; and where the plt. may recover on twenty years possession. *Stokes v. Berry*, 2 Esp. 127 &c.; 2 Selw. 617. Lies for a coal mine. *Cro. Jam.* 150.

Thus this action has been extended in England, and in those of the United States, which have adopted it according to the English practice; but thus extended, it lies only for him, or on the title of him, who has a right of entry; and only for things on which an actual entry can be made. Hence, even in this extended form and condition, it is very different from our old ejectment, not only as to lease, entry, and ouster, but as to the different kinds of titles and wrongs to be asserted and stated in it; as in ours, as stated above, all the titles and wrongs could be asserted and stated, usually asserted and stated in all the ancient writs of right, *formedon* assize, entry, &c. in all their various forms and uses.

§ 3. For what ejectment does or does not lie, see *Goodright v. Hood*, 3 Wils. 23; and 1 Burr, 143 to 147, *Goodtitle v. Archer & al.*; and *Strange*, 59; 2 Esp. 127 to 161, in England.

§ 4. In England, judgment in ejectment is a recovery of the possession, without prejudice to the right, and the plt. having only a *naked possession*, can convey no more—pages 114, 119—is a *possessory* remedy, and lies only where the lessor of the plt. *has a right of entry, or may legally enter*; then the plt. must always shew his lessor might enter by proving possession within twenty years; and twenty years *adverse possession* is a positive title to the deft. It is not a bar to the remedy only, but it takes away the right of possession. Every plt. in ejectment must shew a *right of possession*, as well as of property; therefore the deft. need not plead the act of limitations, as in other cases; a special verdict ought to find that the lessor of the plt. might enter when he brought the action.

§ 5. On the whole, *ejectment*, as formerly understood in Massachusetts, and as understood in England, in its broadest sense, appears to be to purposes as different as the old feudal land action and a modern suit, grounded on a right of possession and of entry, with an entry in fact made or confessed.

§ 6. It is a settled rule in *ejectment*, as in most other real actions, that the plt. or demandant may recover a part of the land or thing he sues for, and this as to time or quantity; but the jury must ascertain with certainty, the part to be recovered; or such part may be ascertained in the pleadings.

§ 7. Therefore, when the plt. demanded *one fourth of one fifth* part of a field, the jury found. and he recovered *one third of one fourth of one fifth*; and the court said, the jury may always find the deft. guilty in *ejectment*, as to so much as the plt. proves title to; the same in *formedon*.

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Ch. 91, a. 6.—  
8 Mod. 277.  
1 Burr. 627.—  
8 D. & E. 487.  
3 Johns. R.  
283.—Lies  
not for tenant  
for years be-  
fore entry; 1  
Cruise, 248.

1 Burr, 60 to  
127, Taylor  
v. Horde.—  
Lies for a de-  
visee against  
an heir; 6  
Cruise, 9, 20.  
—3 Cruise,  
543.—The  
lessor of the  
plt. in eject-  
ment cannot  
release the  
action, 4  
Maule & Sel.  
300.

1 Burr, 329.

5 Bac. Abr.  
307, Abilt v.  
Skinner, cit-  
ed from 1  
Sid. 229.

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6 Mass. R.  
635, Dingley  
v. Dingley.

3 Bl. Com.  
183 to 188.—  
Register, 226.  
—1 Com. D.  
679.—If the  
plt. count on  
demises by  
persons dead,  
the deft. even  
after entering  
into the con-  
sent rule,  
may apply to  
have their  
names struck  
out of the de-  
claration  
without  
costs; 1  
Caines' R. 20.

One claiming  
to be admit-  
ted as deft.  
must shew a  
privity with  
the tenant;  
1 Caines' R.  
161.

§ 8. Hence, when the demandant, in *formedon*, sued for a *fourth part*, he recovered a *fifth part*. He in the course of the trial having proved title to recover only a *fifth* in his particular form of declaring; though in reality entitled to a *fourth*.

§ 9. Though under the name of *ejectment* we adopted near all the English writs in substance, yet in some of their properties we never adopted the English real action. In proceeding in our writ of right, we never employed any but our *common jury* of twelve men; nor was the *assize of mort d'ancestor* ever in use here, because our lands have ever been divisible: and in this action first introduced in the time of H. II., whether brought on an abatement made on the death of the plt's. father, mother, brother, sister, uncle, aunt, nephew, or niece, or on the death of his grandfather or grandmother so *de avo*; or death of his great-grandfather or great-grandmother; so *besayle* or *de proavo*, or on the death of any collateral relation, other than those above mentioned, and so writ of *cosinage*, inquiry was made but on two points, to wit: 1. If the ancestor died seized: 2. If the demandant was his next heir; now both may be found in the affirmative, where lands are divisible and yet the demandant have no title; for though the ancestor died seized, and the demandant be his next heir, yet the ancestor may have devised away the lands, so that this heir may have no title to them. I have never seen in our practice any formed action that has been like the English writ of *nuper obiit*, another *ancestral* action, that is, an action brought where the ancestor died having several heirs, and one held the others out of possession, to establish a division; but a man never could have any of the *possessory* actions that inquired only of the ancestor's seizin at his death, on an abatement happening on the death of a collateral relation beyond the *fourth degree*; but have ever had writs the same in one respect as the English assize of *novel disseizin*; that is, a writ of entry in the *quibus*, in the nature of an assize, to prove the demandant's seizin or possession; a writ stating his seizin and his disseizin, committed by the deft.; in this the demandant proved, first, a title; second, his actual seizin thereon; and third, his disseizin by the defts., and proving these recovered; upon examining our forms of writs and declarations, it will be found we ever have had those which have stated and provided on these very points or grounds. But by 4 Ed. I. Ch. 1., costs and damages were annexed to these possessory actions of assize and entry, while the tenant claimed the profits to enable him to do the *feudal* duties; but as to damages we never have adopted the principles of this statute; that is, to recover them in the same action in which the land is recovered; this never has been done in our practice in Massachu-

setts, if in any other State in the Union. Nor did our ancestors here ever adopt this English feudal principle, allowing the tenant profits, because he performed, or was liable to perform the feudal duties; but instead thereof, the profits here have been recovered in an action of trespass brought expressly for the mesne profits.

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§ 10. In Caines' Reports, vol. i. (New York), it is stated, that a tenant in possession before the action of ejectment is commenced, cannot be dispossessed on a judgment and execution to which he is not a party; and if on a writ of possession a wrong person be turned out, the court will restore him on motion; and it is very proper that a man be not turned out of possession before he is called on to defend his possession, which is on general principles *prima facie* evidence of title.

§ 11. The court will never permit the heir to be disinherited by mere conjecture; nor will defts. be allowed to show the premises lay out of lot No. three, after he had taken a lease of them from the ancestor, as being within that lot, and had occupied and paid rent for them as such; cited 2 Schoales & Lefroy 72; 2 Campb. N. P. 12.

10 Johns. R.  
358, Brant v.  
Livermore.

§ 12. *The effect of a recovery in ejectment.*—Lord Mansfield said, it is a recovery of the *possession* (not of the seizin or freehold) without prejudice to the right, as it may afterwards appear even between the same parties; this principle is recognized in New York.

1 Burr, 114,  
Atkins v.  
Horde.  
3 Johns. R.  
269.

§ 13. In this case, sixteen ejectments and sixteen several issues thereon, and each declaration contained many messuages, and were word for word the same; and the court ordered them to be consolidated on motion, though opposed by the plts. on the ground torts are in their nature several; but in this case, Smith v. Crab, there were ten declarations on the same demise for ten houses in the occupation of ten persons, said to be on the same title, the court refused a motion to consolidate, but solely on the plt's. account, because it might oblige him to go on in all, when he might be ready only in some of the actions, and he might have sued them at different times.

Barnes, 176.  
Grimstone v.  
Burgers.—2  
Stra. 1149,  
Smith v.  
Crab.  
See Ch. 228,  
a. 4, s. 11.—  
11 Co. 5.

§ 14. Tenants in common in New York, may declare either on a joint or separate demise; and separate demises from several lessors between whom there is no privity of interest, may be laid in the declaration; and at the trial the plt. may prove separate titles to separate parts of the premises and recover accordingly; here is no surprise on the deft. and a multiplicity of actions is avoided.

2 Caines' R.  
169, Jackson  
v. Bradt.—  
12 Johns. R.  
185, Jackson  
v. Sidney.

§ 15. *The plt. must declare according to his title.* If he has

2 Phil. Evid.  
Doe v. Chap-

171; see Lit. Sect. 316, Co. L. 45.—12 East, 57, Doe v. Read—3 Taun. 120,  
11—12 East, 221, Doe v. Grant.—Ch. 92, a. 1, s. 11; Doe v. Prosser.

CH. 178. a joint lease from several persons, he must so declare and  
 Art. 14. prove that they have such an interest as to enable them to  
 join in a lease, and if made by A, tenant for life, and B, in remainder, hence in A's life, the plt. must declare as on a lease made by him, and after his death on a lease made by B. Plt. may declare on the several demises of each joint tenant, as well as on the joint demises of all, as thereby he has the entire interest; and if the deft. pay one entire rent to the common agent of the plt's. several lessors, it will prove a joint demise. See how an award binds the right so as not afterwards to be disputed in ejectment, c. 13. a. 4, s. 7; *ouster* of one tenant in common where presumed, what is a disseizin of one by another, c. 104, a. 3, s. 3. See *Doe v. Bird*, 11 East, 49; 3 Maule & Sel. 275.

*Doe v. Smith*. § 16. Neither the tenant who accepts a lease and pays  
 4 Maule & rent, or any person claiming under him, is allowed to dispute  
 Sel. 347 —2 the landlord's title, nor can the tenant put a third person into  
 W. Bl. 1259. possession so as to enable him to set up an adverse title at the trial in ejectment, *Hodson v. Sharpe*, 10 East, 353; but the tenant may shew after he paid the last rent, his lessor's title ended. 4 D. & E. 682; 3 Maule & S. 516, *Doe v. Ramsbotham*; *Doe v. Watson*, 2 Starkie, N. P. Ch. 231; 7 East, 363; 6 East, 530.

*England v. Slade*.

2 Phil. Evid. § 17. *Non payment of rent*. It must be demanded at the  
 178, *Goodright v. Cator*, day of payment, and at the place of payment, or if none be  
 Dougl. 477.— appointed, on the most conspicuous parts of the premises, in  
 7 East, 363, order to authorize ejectment for not paying it. Co. L. t.  
*Doe v. Davis*. 202; 4 Co. 73.; *Duppa v. Mayo*, 1 Saunders, 287, Willes,  
 —2 Co. 64, 505; 17 Johns. R. 66, *Jackson v. Harrison*. The lessor  
 case of Pen- waives the forfeiture by the lessee of his lease by accepting  
 ant. rent accruing after the forfeiture; *Goodright v. Davids*, Cowp. 803; but otherwise if there be a clause in the lease, it be null and void on non-payment. Willes, 176, *Jones v. Verney*. If a lease for years be voidable without entry; not so a lease for life.

1 Hen. & M. § 18. In ejectment, evidence cannot be introduced to prove  
 306, *Witherington v. M'Donald*. that a patent was obtained irregularly, especially if no fraud be alleged, and no *caveat* entered against issuing it. See *Hambleton v. Wells*, p. 307; fraud, among other things, charged.

1 Hen. & M. § 19. Ejectment does not abate by the death of the lessor  
 532.—*Thrustout v. Grey & al.*—2 Bl. of the plt.; *Kenny v. Beverley*. He died after the action was carried into the court of appeals. In this case, judge Tucker relied much on the case in 2 Stra. 1056; in which the lessor of the plt. died after verdict in ejectment; the lessor was tenant for life; held, though "the possession cannot be obtained, yet the plt. has a right to proceed for damages

and costs." Judge Roane said in this case, *Kinney v. Beverley*, the plts. term was continuing, and he had a right to recover possession, damages, (though nominal) and costs—relied on Blackstone's idea, that the plt. is a real party, 205, and Appendix, No. 2, s. 4. But see *Aslin v. Parkin*, Ch. 42, a. 2, s. 14, and Ch. 132, a. 8, s. 6; but if the lessor of the plt. die, security and costs must be given; 2 Hen. & M. 31; but if not, it is no error; 2 Hen. & M. 611, *Purvis v. Hill*.

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§ 20. Ejectment by *Beverley* in the District Court of Staunton, for certain lots, &c., and held: 1. They were not forfeited by an act of December 30, 1790, &c. unless assessed and listed by the commissioner of the revenue, returned to the auditor of public accounts by the sheriff or collector, and advertised by the treasurer, as directed by the act, section 4, incorporated into the 34th section of the act of December 13, 1792: 2. If the jury find twenty years' possession in the plt. he recovers, though one of his title deeds be not *indented*, and expresses no consideration. The statutes of Virginia minutely provide for assessing and collecting taxes; and when laid on a tract of land, if not paid in three years, the right to it is forfeited to the State, and vested in it, and lost by the owner. By the constitution of Virginia, all escheats, penalties, and forfeitures the king had, now belong to the State; lands were once forfeited for not paying his quit rents (2s. one hundred acres); abolished by an act of May, 1779. Hence there is now in the State no forfeiture of lands whatever, except such as are positively provided for by some statute. And by an act of 1794, c. 74. forfeiture of lands, for treason, and other offences, was wholly abolished; but escheats of the land purchased by aliens remain. And if the king or state have but a *right* to lands, there is *no seizin* to enable either to convey *till office found*. See *Seizin and Disseizin*, Ch. 104, a. 3, s. 1 to 41. So, if only a *right* be forfeited for non-payment of taxes. See *Estates by forfeiture*, Ch. 136.

*Kinney v. Beverley*, 2 Hen. & M. 318, 344.

*Dowtie's case*, 3 Co. 10.

§ 21. This was ejectment for three thousand five hundred acres of land in Fairfax county, brought by Charles Carter v. Edward Washington & al. Held, when Robert Carter and others were tenants in common of certain land, and he had sold a part thereof to Edward Washington and others, and a decree for partition was obtained by the other tenants in common against Robert Carter, in a suit commenced *after the sale*, was no evidence in their favor in ejectment against the venders who were no parties to the partition suit;—the partition was by chancery process.

*Carter's Trustees v. Washington & al.* 2 Hen. & M. 345, 355.

§ 22. *Ejectment to recover lands in Virginia, conveyed in trust to secure a British debt; defence usury.* The jury found a special verdict, stating that August 24, 1790, Baylor was

*Pollard v. Baylor's Devises*, 4 Hen. & M. 223, 242.

CH. 178. seized in fee of the land in question, and executed a deed of  
 Art. 15. trust to James Brown, which recited Baylor was indebted to Alexander Donald & Robert Burton, of London, merchants and partners &c. in £819. 7s. 9d. sterling &c.; that he conveyed the land and sundry slaves in trust, to secure the payment of said debt in three equal annual payments, with interest from the date of the deed, the payments to be in tobacco, to be delivered at, and addressed to them in London, on which they were to draw the usual and accustomed mercantile commission of twenty-one shillings sterling for each hogshead *actually shipped*; and further agreed and provided, that in case of *non-shipment* of the tobacco, a further sum equivalent to and in lieu of the usual mercantile commission thereon, at the rate of twenty-one shillings sterling a hogshead, estimating each hogshead worth ten pounds sterling, was to be added to each payment. Held usury, and the deed void. Brown, the trustee, had power to sell enough of the estate to pay the debt and interest, and said further sums. When Baylor died, the suit was revived against his devisers. Brown sold, and Pollard purchased. In this, Judge Roane, and in a former trial, he and Judge Lyons held this transaction *not usurious*; so the court held it in a second trial. And is not this the better opinion? But few authorities were cited there. See Ch. 153. The first branch of the contract clearly was not usurious; and if Baylor was subject to more than legal interest on the second, it was his own fault, for he had his election to ship the tobacco. See *Tate v. Willings, &c.* Ch. 153.

4 Dallas, 120,  
 Calhoun's  
 Lessee v.  
 Dunning.

Yelv. 143, see  
 Ch. 71, a. 1,  
 s. 4.

§ 23. *An award may bar the plt. in ejectment, who otherwise has title.* The court said, "to be sure an award cannot give a right to land; but a report of referees will settle a dispute about land either in ejectment or in action of trespass;" the award was affirmed by the court, which settled a boundary. Ejectment does not lie for a water course, nor does a præcipe, nor can livery of seizin be made of it; but the action must be of so many acres of land covered by water; but if the water only belongs to the plt. and not the land under it, and he is disturbed, his remedy is an action on the case.

#### ART. 15. *Land Actions.*

§ 1. Having thus far considered pleas proper in *ejectment*, and the manner in which the action of ejectment has been used, and how considered at different times, we now come to pleas proper in land actions, according to modern practice, which in a good degree, in Massachusetts and Maine at least, has restored the ancient manner of pleading, and makes much *technical* knowledge in pleadings, in actions to recover possession of lands, highly necessary.

We may now drop the word ejectment, and consider the tenant sued and summoned into court to answer the demandant in a *plea of land*, of late deemed generally a better expression than *plea of ejectment*, which originally and technically meant nothing more than ejecting the lessee *for years* out of his *term*, and complained only of a *bare dispossession of a mere chattel interest*; whereas in our real actions, in which the tenant is summoned to answer the demandant in a *plea*, &c. every kind of land and estate in it. and every kind of title therein, so seizin and possession thereof, is claimed by him, brought in question, and recovered by him, if he substantiates his claim; it is evident, therefore, that the general and broad expression, *plea of land*, is more proper than the very limited one, *plea of ejectment*, except when a *mere term for years*, or perhaps a *mortgage*, a *mere chattel interest*, is to be recovered.

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§ 2. In every case the deft's. plea in bar ought to be an answer to the plt's. declaration, in that, the plt. charges the deft. on *contract*, or a *record*, or on a *tort*, and it must be an invariable rule in pleading for the deft. in bar, to answer clearly and fully, and in many cases technically, this charge, whether *the breach of a contract*, *the not satisfying a judgment*, or *the commission of a tort*, on the plt. or on his property, be the charge; and every declaration drawn, or charge made in a proper manner, will contain some material, operative, and often technical words, to which the deft's. answer or plea ought particularly to be applied in pleading every special plea in bar.

2 Stra. 1064.  
In ejectment the court to protect a possession will allow excuses for defaults, in other cases not receivable; 3 Caines' Cases, 563.

§ 3. It is then material to see, in *land actions* especially, what these material, operative, and often technical words are, in addition to those contained in American *printed forms*, keeping always in view the different grades of real or land actions.

Three grades of actions.

§ 4. *Personal actions* are all of the same kind and degree, but in real actions there are three degrees, or grades, settled in Ferrer's case, 6 Co. 8. The first grade is when the demandant declares on his own seizin: the second, on the seizin of some ancestor, lineal or collateral: and the third, in a writ of mere right. The distinction is plain; it is obvious when the demandant declares on his own seizin; so when on his ancestor's seizin; and in a writ of right, he demands the inheritance as his right, and lays no disseizin, but only that the tenant has entered and holds him out, &c. Nor do these three grades of real actions include a mere term for years, to recover which, the plt. declares on his possession only, he having no seizin; yet the mortgagee becomes seized on the execution of the mortgage deed, whenever the mortgagor has power to convey.

6 Co. 8, 10,  
Ferrer's case.  
3 Bl. Com.  
180 to 198.—  
2 Vent, 169,  
Lechmere v.  
Toplady.—  
Cro. Car. 35.  
1 Salk. 280.  
Operative  
words in  
declarations,  
&c.

CH. 178. § 5. "The plt. must in the progress of this action, allege  
 Art. 15. some seizin of the lands and tenements in himself, or else in  
 some person under whom he claims, and then derive the  
 right from the person so seized to himself."

3 Bl. Com.  
 195, 196.

Booth on  
 Real Actions,  
 181, 182.—  
 English en-  
 tries.

§ 6. In addition to the many cases in American Precedents, containing declarations in real actions, entire, or the material, operative, and technical words in declarations in land cases, the following deserve attention in the numerous cases of intrusion after the death of tenants in dower, by the *curtesy*, for life, and in tail.

§ 7. 1. After the death of tenant in dower, in writs of intrusion, the demandant demands seizin and possession of certain premises, he bounds and describes, and adds, which he claims to be his right and inheritance, and into which the said D. (deflt.) hath not entry but by the intrusion which he made into the same after the death of C., who was wife of N., who held the same in dower of the gift of the said N., formerly her husband. See count in Booth, 182.

§ 8. *In the per*, as above, to the word *entry*,—but by F., who demised them to the said D. (deflt.) and who intruded himself into the same after the death of C., who, &c. as above.

§ 9. *In the per and cui*, as above, to *entry*,—but by F., to whom G. demised the same, who intruded himself into the same, after the death of C., who, &c. as before.

§ 10. *In the post*, as above, to *entry*,—but after the intrusion which F. made into the same after the death of C. who, &c. as above.

§ 11. If the wife or widow recover dower by judgment, then the technical language is, who recovered her dower by the consideration of our justices of our — court, held at —, on —, by our writ, which belonged to her of the free tenement which was of the aforesaid N., formerly her husband. Register, 233.

Booth on  
 Real Actions,  
 182, 183.

§ 12. 2. After the death of tenant by the *curtesy*, as above, to the word *entry*,—but by the intrusion he made into the same after the death of C., who held the same by the law of England [in Massachusetts practice, as tenant by the *curtesy*] after the death of E., formerly his wife, mother, &c. of the demandant, whose heir he is, &c.

§ 13. *In the per*, as above, to *entry*,—but by F., who demised them to the said D. (deflt.) and who intruded himself into the same after the death of C., who held the same as tenant by the *curtesy* after the death of E., formerly his wife, &c. as above.

§ 14. *In the per and cui*, and *in the post*, after the death of tenant by the *curtesy*, same as in the above cases of dower, *mutatis mutandis*. Register, 234.

The writ of entry was a possessory action to recover the freehold, and the only action then was of the land till the assize was had. 3 Bl. Com. 182.

CH. 178.  
Art. 16.

§ 15. 3. After death of tenant for life, as above to entry,—but by the intrusion he made into the same, after the death of C, to whom H, father (or other ancestor) of the demandant, whose heir he is, demised the same for the life of the said C.

Booth on  
Real Actions,  
183.

§ 16. In the *per, per and cui, and post*, after the death of this tenant for life, the same as in said cases of dower, *mutatis mutandis*. Register, 234; Rastell's Entries, 271 &c.; Booth's Real Actions, 171 &c., many forms.

§ 17. 4. After an estate tail by one in remainder; as above to entry,—but by M. who intruded himself into the same, after the death of R. who held the same for his life, of H., by the assignment which T. who demised to the aforesaid R. for the same term thereof, made to the said H. and the heirs of his body issuing, so that if the said H. should die without heirs of his body issuing, the same messuage should remain to the demandant; and which after the death of the aforesaid R. and H., ought to remain to the said B. (the demandant,) for that the said H. died without heir of his body issuing, as the demandant says. Register, 235.

ART. 16. § 1. These were the English technical modes of declaring in these cases of intrusion, after the deaths of these four descriptions of tenants, three for life in fact, and one in tail; and those modes of declaring, stated the true point in each case, to which the tenant or deft. was to answer and plead; and to form his true answer and plea (where he did not plead not guilty,) he had only to find the true point in the plt's. charge, as the intrusion, which always means illegal intrusion, or entry, or other point in his charge, decisive in the action, decided either way, for plt. or deft., and plead to that point generally, that the one charged with making the intrusion, did not intrude.

The decisive  
points, the  
deft's. plea  
must an-  
swer.

§ 2. It will be observed, that in all these cases of intrusion charged, and in all writs of entry in which the demandant makes a charge in his declaration, that the deft. or tenant intruded or illegally entered into the demanded premises, or that some one under whom he holds or claims, did intrude or illegally enter, two things are affirmed by the demandant: 1. That the premises demanded, are his right and inheritance: 2. That the tenant or one under whom he holds, has at a time named, intruded or unlawfully entered into them; and in fact this is the substance of almost every declaration in a real action, to recover lands or any property in which the demandant can, in its nature, have an inheritance, and upon

The plt's.  
title and  
deft's. illegal  
holding the  
land &c.

As his dis-  
seizin, intru-  
sion, abate-  
ment, &c.

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which intrusion or entry can be made in contemplation of law. The demandant asserts his right to the thing demanded, and alleges the tenant has illegally entered or intruded himself into it; both must in substance be true, and both must in substance be proved by proper evidence; for until the plt. has proved a title to the lands or tenements he demands to be delivered to him, why complain the deft. withholds them from him, or has illegally or wrongfully entered into them, as the plt. clearly has no right to complain at all, till he shews he has right and title to recover, these being the material points. The demandant's title, and the tenant's illegal holding of the lands &c. in question, the points alleged and affirmed by the demandant; the question next is, how is the tenant to answer and plead, in order, in the due course of pleadings, to come to a proper issue, for the jury or judges to try and decide, especially the jury. It is obvious it will not be proper for the tenant so to plead, as to come to issue on the demandant's right and inheritance; for he may have the right and inheritance, yet the tenant may be entitled to the possession for a time, therefore a verdict finding the estate the right and inheritance of the demandant or not, decides nothing as to the tenant's right to hold it for a time. The tenant then will clearly so plead as, in the due course of pleading, to come to an issue on the other point charged in the declaration, that is, the illegal entry or intrusion charged to have been made by him, or one under whom he holds. If the charge on this point is of a disseizin, the tenant's plea is, *nul disseizin*, or did not disseize in manner and form as the demandant alleges. And it is always a disseizin where the tenant enters illegally upon the land, and ousts the demandant in fact, or one whose title he has; and such entry and ouster, is the material point in most land actions. If the plt. means to try the deft. as a trespasser only, as in all actions for trespasses on lands, or in buildings, the plt. alleges not any disseizin or ouster in his declaration; nor does he, if he means only to sue for a mere nuisance to them; but in all cases in the nature of nuisances, and of trespasses *vi et armis*, the plt. goes on the ground, he himself is in possession, and so complains of a wrong to his possession. In which case the deft's. plea obviously is, *not guilty* of the wrong charged, except where he admits the fact charged, the entry &c., and intends to justify it, as lawfully done by him; or excuse it, as done by accident &c. Besides these grounds of charge, *disseizin, trespass, and nuisance*, or obstructions, and disturbances in the nature of nuisance, there remains but one, and that is *intrusion*, technically considered; and this may be in two

cases. 1. *Ouster by intrusion*, is where the tenant of the freehold dies, and before he in remainder or reversion enters, some stranger enters or intrudes in fact into a vacant estate; for if any owner be seized, there can be no intrusion, but the illegal entry is either a trespass or a disseizin, except in cases of chattels real, where the illegal entry is a trespass or a dispossession. The only difference between this intrusion and abatement, is this, the abatement is always to the prejudice of the heir or devisee; intrusion, to him in remainder or reversion. Intrusion is always immediately consequent upon the termination of the particular estate; an abatement is always consequent upon a descent or devise of an estate in fee simple. In the Register, 233, 234, are several forms of writs on intrusions in the *per*, *per and cui*, and in the *post*; and no writ of entry in the *post*, or beyond these degrees of *per*, and *per and cui*, lay at common law. Abatement and intrusion is on the very same principle; each takes place after the death of the former freeholder, and before the subsequent one enters, by a tortious entry of a stranger between them.

§ 3. 2. Intrusion is also where there cannot, by law, be a disseizin. As where the Commonwealth owns the lands, and one wrongfully enters upon them, and gets possession, claiming them adversely; as the Commonwealth cannot be disseized, this entry cannot be treated as a disseizin, but is treated as an intrusion on the State's land; and hence, the attorney-general for the Commonwealth, in the *scire facias* on information of intrusion, after stating the Commonwealth's title and seizin of the land,—“in its own *demesne*, and have as yet continued seized thereof, taking the *esplees* of the same, to the yearly value of \$—; and ought now to be in the undisturbed possession thereof; nevertheless, J. L. of &c. has since illegally and unjustly intruded himself upon the premises, and disturbed the said Commonwealth in the possession of the same, and yet continues to disturb the said Commonwealth in the possession thereof.” In this case J. L., and his co-proprietors entered, claiming the absolute fee simple of the land, and totally denying the Commonwealth had any title at all to them; yet this entry and claim was not considered as a disseizin, but only as an illegal, unjust intrusion on the lands, or an illegal disturbance of the Commonwealth in the possession thereof. The plea, in this case made by Parsons and Dane, for the deft. or tenant, was the general issue of *not guilty*, and deemed the true plea.

§ 4. And in considering writs of entry and intrusion, it is to be observed, that “a writ of entry will lie only against the tenant of the freehold, and if he do not disclaim, or

CH. 178.  
Art. 16.

4 Com. D.  
407—Co.  
Lit 277—3  
Bl Com. 169.  
—Register,  
233, 234.—1  
Cruise, 14,  
abatement  
must be  
avoided by  
entry or con-  
tinual claim.

2 Cruise, 539.

Intrusion on  
the State's  
lands.

American  
Precedents,  
307, 308,  
Little's case,  
Cumberland  
county.

5 Mass. R.  
352, Higbee  
v. Rice.

CH. 178.  
Art. 17.

Common-  
wealth v.  
Pejepscot  
Proprietors,  
7 Mass. R.  
399.

Not guilty is  
the general  
issue in cases  
of intrusions.

plead non-tenure, he admits himself to be tenant of the freehold, by the plea of *nul disseizin*."

§ 5. So in this information of intrusion the defts. pleaded the general issue of *not guilty*, as well as a special plea in bar, that is, an award in the same cause. See Ch. 109, a. 11. As *not guilty* is the general issue in this class of intrusions, perhaps it is the proper and best general issue in the other class, where a stranger intrudes on the land, on a possession vacant, between the true freeholders as above; but as the word *intrusion* is technical in both cases, or the charge against the deft., that he *did intrude*, or that he *did illegally intrude himself*, is technical, of an ascertained meaning in law, it may be a good issue that meets the charge, for the deft. to say, he did not illegally intrude himself upon said lands in manner and form as the Commonwealth alleges. This meets the gist of the whole charge, as the plea of *nul disseizin* meets the charge of *disseizin*. But as the general issue of *not guilty*, is a good plea in both cases, and generally in use, it may be best to plead it. So in our actions of *formedon*, the general issue has been usually *not guilty*; as was also in our writs of right till about 1803, at least, in many counties; but since the mise has been joined, as stated in *Adam v. Frothingham*, in Story's Pleadings, p. 337, 338.

As matters of *excuse* in land actions, as well as others, may be given in evidence on the general issue, as the practice is almost universal so to do, it will not be here necessary to consider how these matters may be specially pleaded; however, if a party chooses to plead them specially, there is one general settled rule, that is, to plead them according to the truth of the facts, and the true operation of the law upon them. What these are, will almost universally depend on the particular circumstances of each case. How general and particular estates must be alleged; see *Jones v. Whithy*, Ch. 125, a. 1. This is a general rule that applies as well to pleas as to declarations.

ART. 17. *But matters of justification must be pleaded.*

§ 1. Matters of justification as to nuisances to, and trespasses on, lands &c., have been already considered, Ch. 69, Ch. 71, Ch. 74, Ch. 172, and Ch. 173; but very few are the matters in justification that *must* be pleaded in land actions; because in a writ of right there is a particular issue framed, the mise joined on which, as on *not guilty*, in the action, both parties may, and ought, to give title in evidence, and it is understood of every kind. And as before observed, there is in this highest real action no *disseizin* charged, as the parties do not proceed to try any *disseizin*, but the mere right of property, however, the *disseizins* may have been.

In all other actions as to lands &c. a disseizin, or an intrusion, or a dispossession, is charged by the plt. as having been done or committed upon his lands &c. by the deft.; and if he has in fact done or committed such disseizin, intrusion, or dispossession unlawfully, he can have no justification of this act; and if by reason of title and right of entry, both of which may be given in evidence on the general issue, by the deft., he has, in fact, not committed or done any disseizin, intrusion, or dispossession on the plt's. lands, the deft. must be acquitted on the general issue, proving his title and right of entry, on this issue.

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§ 2. However, the deft's. act of entering upon the lands demanded, claiming them as his, the act complained of by the plt., has been in several cases justified by the deft. in a special plea of justification, as lawfully done by him; or in some such pleas as follow.

§ 3. As in this *inquest of office*, or information of intrusion, brought by the State against Prescott & al. to recover lands granted by it, on conditions, and for breach thereof. The defts. pleaded double, (this allowed, on objection and argument :) 1. Condition performed: 2. An after act of the legislature waiving the breach of condition. Issue on the first, and demurrer to the second, on oyer of the resolve and bringing the whole on the record. It seemed to be the opinion of Parsons and Dane, counsel for the defts., that the performance of the conditions was an essential part of their title, and on which they justified holding the lands against the commonwealth; nor that dispensing with, or waiving the conditions, could be given in evidence on the general issue of not guilty; and so was the opinion of the counsel on the government's part.

Commonwealth v. Prescott & al. 1797, 1798, Cumberland county.

§ 4. So in *Kent v. Kent*, before stated, a former judgment was specially pleaded in bar, in *formedon*, and deemed necessary so to be pleaded, as a former judgment in bar usually is.

§ 5. So in the case above of the Pejepscut Proprietors, a judgment on an award was specially pleaded in bar of the inquest of office, or information of intrusion, brought to recover lands: so in the action of *Iven v. Hooper & al.* stated in a former chapter, brought to recover mortgaged lands, many special pleas in bar were pleaded in addition to *nul disseizin*, mostly to shew conditions performed: so in the action to recover lands of *Palmer & ux. v. Downer*, above stated, the deft. pleaded in bar the *alienage*, specially, of the plt's. father.

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6 Mass. R.  
418, Wolcott  
& al. v.  
Knight.

§ 6. In this case, to a writ of entry *sur disseizin*, the tenant pleaded the plt's. deed, or his ancestor's, conveying the premises to a third person, after the disseizin complained of, in bar. Plt. replied, nothing passed by the deed, and issue thereon found for him.

§ 7. So in *Everenden & al. v. Beaumont*, stated Ch. 167, a. 9, to entry *sur disseizin*, on the plt's. father's seizin, and abatement on his death, by a stranger, defts. pleaded a release from the plt's. to them &c.

§ 8. If in *formedon, non devisavit* be pleaded, it is a special issue. 5 Mass. R. 438, *Dudley v. Sumner*; *Commonwealth v. Bakerstown Proprietors*, cited 11 Mass. R. 202 &c., and in another chapter.

§ 9. *Special pleas to turn the plt's. action, as on an absolute title, into a mortgage.* It has ever been a practice in many places, for the mortgagor to give an absolute deed of the lands &c. mortgaged in fact, to the mortgagee, and at the same time to take from him a bond, or covenant, to reconvey the lands &c., on the mortgagor's paying the debt, which together make a mortgage, as stated Ch. 111, 112. Often the mortgagee in fact, not knowing how the mortgagor means to use his bond or covenant, sues on his absolute deed absolutely to recover the lands, and will, of course, do it, unless the mortgagor can by special pleading turn that deed, absolute on the face of it, into a mortgage. To this purpose the mortgagor pleads specially, as *Story's Pleadings*, 345, 346. Such pleading is on Massachusetts act of November 4, 1785. But I think the pleadings to the same end may be in a form somewhat different; that is, the deft. in the first instance may plead in bar of the plt's. action, because having in fact but a mortgage title, he declares as on, and for, an absolute title; and when, too, this mortgage title is created by his own bond or covenant, the deft. therefore has a good right to plead, and say, I gave a mortgage of my land, and not an absolute deed and title, as appears by our two deeds, both executed at the same time. This manner of pleading is preferred, because calculated first to settle the main question if a mortgage or not; a question to be settled on the record before the deft. can be heard in equity. The plt. sues on an absolute title, as when he sues on the penalty only of a bond having a condition, but this he does not notice. In this case the pleadings first are formed in order to find if the penalty is forfeited, if not, there is no hearing in equity; but there is if forfeited, and after found to be forfeited, the deft. prays to be heard in equity; or he may, as part of his plea, pray to be so heard.

§ 10. In several cases it is a question, if the plt. shall have

Bowers & al.  
v. Putnam.

a conditional judgment as in mortgage &c., or judgment for absolute possession. If even the mortgagee sue merely to get possession, he may declare on his seizin and give his deed in evidence, and have judgment for absolute possession; but if he sue to *foreclose*, he must declare in mortgage, and have the conditional judgment. But if mortgagee in fact, and he declares on an absolute title and for an absolute judgment, the mortgagor or one claiming under him, may by his plea on record, defeat the action, or oblige the mortgagee to take the conditional judgment in mortgage; because the mortgagor &c. by such plea shews the plt. has but a conditional title after condition is broken. But there are cases in which the mortgagee, or one in fact having a conditional title, may declare and recover as on an absolute one; as 1st, where the mortgagee sues to get possession before condition broken, and so at common law, then the three years for foreclosure do not begin to run till after condition broken, and the mortgagee makes known he is in possession for condition broken, and to foreclose.

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Art. 18.

2. Where the mortgagee or one with conditional title, sues to get possession from one holding the land, no party to the conditional title, neither mortgagor, or one claiming under him; hence, cannot plead this conditional title.

3. Where the mortgagee sues absolutely to get an absolute possession, and as to part of the land demanded, one deft. is no party to the conditional title, and another is; for there cannot be two judgments, one conditional and the other not; in this last case, the deft., party to the conditional title, must tender payment and file his bill in equity, in order to redeem, stating the true title. 15 Mass. R. 486, Partridge & ux. v. Gordon; Lewis v. Babb & al.; Bowers v. Putnam & al.

§ 11. A third person cannot defend as landlord, in ejectment &c., where it appears the tenant in possession, came in as tenant to the plt's. lessor, and paid to him rent, though under an agreement expired, and where the tenant in possession does not appear to defend, and disclaimed after he paid the rent; for as the tenant could not dispute the title of the lessor, neither can any other as his landlord; and even though such other person has entered into the landlord's rule. The acts of the parties must prove who is landlord. The tenant should give up his possession to the plt's. lessor, then the deft. if he has title may have his ejectment. The principle of this case applies to any kind of land action, in which the deft. appears to defend as landlord.

4 Maule &  
Sel. 347.

ART. 18. *Cui in vita—dum non compos mentis—dum fuit infra ætatem.*

§ 1. There is a small class of actions that may be barely

CH. 178. mentioned, in which the plt. claims to recover the lands because parted with when he or she was not of a capacity to convey them when the conveyance, or supposed conveyance, was made.

Art. 18.

Register, 232.  
—3 Com. D.  
314.—2 Com.  
D. 92.

§ 2. In *cui in vita*, the demandant demands seizin and possession of certain lands, &c. described, which she claims as her right and inheritance, and into which the said D. (deft.) hath not entry but by C., formerly husband of the demandant, who demised the same to the said D., whom (said C.) the demandant could not in his life time oppose. So she may declare in the *per and cui*, and in the *post*, as in article 15, this chapter, *mutatis mutandis*.

Register, 228.  
—3 Com. D.  
555.—4  
Wood's Con.  
437, 438

§ 3. *Dum non compos mentis*. Here the plt. demands land, &c. which he claims as his right &c. which lands &c. the demandant while he was not of sane mind demised to the said D. (deft.)

Register, 228,  
229.—3 Com.  
D. 554 —4  
Wood's Con.  
437.

§ 4. *Dum fuit infra ætatem*. In this case, the plt. demands lands &c. as his right and inheritance, which lands &c. the demandant, while he was within age, demised to the said D.; and if any conveyances between the person to whom the *non compos*, or minor, conveyed, and the tenant of the land at the time of the action brought, declarations may be framed in the *per*, *per and cui*, and *post*, as in the books of entries and article 15, above.

§ 5. So in *entry sur disseizin*, with title; the plt. claims the lands as his right and inheritance, and of which the deft. unjustly, and without judgment, disseized C., father (or other ancestor) of the demandant, whose heir he is, &c. So in the *per*, *per and cui*, and *post*, as above.

§ 6. Other technical ancient forms might be added, in which the *tortious entry* into the lands, made by the deft. or by some one under whom, or after whom, he claims, is thus particularly, and according to our present use of the English language, peculiarly described; that is,—hath not entry but by F., to whom G. demised the same, who intruded himself into the same &c. beginning with the last wrongdoer, and running back to the first. Probably this peculiar arrangement of words in English has arisen from translating the Latin forms and words according to the order in which those words were written, and not as is usual in most translations of Latin according to the sense; but be this as it may, it is not necessary or material to pursue these ancient forms further, because by attending to our modern forms, we shall find we follow these ancient ones but in substance, not in words; and especially not in any such peculiar arrangement of words or sentences.

§ 7. In these cases of inability in the plt. or demandant, it

will be observed, that a conveyance in form is admitted, but this inability is insisted on. Hence the deft's. plea must be formed to come to issue on this. If he cannot safely demur to the allegations of disability, perhaps the deft. may safely demur to a declaration alleging the plt. conveyed *dum fuit non compos mentis*, if the opinions of Coke &c. cited Ch. 35, a. 6, are correct; so Ch. 127; but these may be doubted, for reasons there stated. In *Swett v. Boardman*, stated Ch. 93, a. 3, the heirs pleaded the testator was not of sound mind; the devisee answered and pleaded that he was of sound and disposing mind, and on this point was the issue to the jury. So in the case of *Mr. Norris' will*, Ch. 127, a. 6; and in the case of infamy alleged in a *dum fuit infra aetatem*, the deft. may plead, the plt. was of age, and come to issue on this point. So in *cui in vita*, the deft's. plea will be formed according to the circumstances of the case.

CH. 178.  
Art. 19

Swett v.  
Boardman.

§ 8. Though we adopt the principles of these writs so far to enable those wives, minors, and persons *non compos*, or their heirs &c. to avoid such conveyances as are complained of in these writs, yet we never have adopted their peculiar forms; but usually, these disabled persons or their heirs, to avoid such conveyances, sue in common form, and demand the lands as their right; shew such titles as they had before such conveyances made in fact good titles; and of course the defts. are driven to disclose their titles, or grounds of defence, and so to plead these conveyances by husbands alone, of wives' lands, by minors and persons *non compos*, or, as is usual, defts. are driven to give such in evidence on the general issue in their defence; and then the question is made upon their validity, and decided commonly in a trial on this issue, or a case stated or reserved; for when the demandants declare generally on a seizin in fee, as in themselves or in some one from whose seizin in fee they derive their lesser estates, as in tail &c. the defts. must necessarily plead generally, or the general issue, for till the trial comes on, on the issue joined, they cannot know that their conveyances will be questioned; and by a settled rule all matters must be in evidence that cannot be timely pleaded.

ART. 19. *Advancement pleaded in bar, and allowed.*

This was a writ of entry in which the demandants counted on their seizin within twenty years, and on a disseizin by the tenant; and claimed in fact their father's moiety in his father's estate in Hamilton. This cause of the first impression was argued at great length by the counsel; and in deciding which, as appears by the report, the judges were divided.

4 Mass. R.  
680, 692,  
Quarles, jun  
& al. v.  
Quarles.

To understand this cause correctly, the substance of the

Ch. 178. pleadings must be stated: 1st plea was the general issue, mere  
 Art. 19. form; the 2d plea special; and the tenant pleaded that his father, Francis Quarles, August 17, 1785, had children, namely, Francis, the tenant; Elizabeth, wife of N. P.; and Samuel Quarles, father of the demandants; and the father having assigned and delivered to his son Samuel, "his full portion of the estate of the said Francis, the father, by advancement," he, the son, on that day, "in consideration of such advancement, by his deed of that date, sealed" &c. in court &c. acknowledged that he was fully satisfied his full share and portion of his father's estate, and did therein fully acquit and discharge all claim he or his heirs might have thereto; plea stated the deaths of father and son; and gave colour, saying the demandants, claiming by a colour of a deed of feoffment, made by the father, said Francis, to them, when no right passed by it, entered &c. on whom the tenant entered,—*hoc paratus*.

Demandants prayed *oyer* of said deed, and had it; this was, "whereas, I have this day received of my honoured father, Francis Quarles, of that estate which he bought" of T. Patch &c. "of which he hath given me a certain part, in consideration of which I am fully satisfied and contented, as my share of his estate; furthermore do fully acquit and discharge my father's estate forever hereafter, from having any demand thereon as an heir to any part thereof; in witness" &c. August 17, 1785. Being read &c. the demandants said, *precludi non*; because, they said, the father, August 17, 1785, by his deed &c. produced &c. for a valuable consideration &c. (£233. 6s. 8d.) gave, granted, sold, and conveyed to said Samuel Quarles in fee, a certain tract of land in the same deed described, being the same deed received of the said Francis Quarles, the father, by the said Samuel Quarles, and the same land which was bought of Timothy Patch aforesaid, in the plea aforesaid mentioned,"—*hoc paratus*.

*Rejoinder*. The tenants prayed *oyer* of this the father's deed, and had it; by which, in common form, for £233. 6d. 8s. lawful money, he gave, granted, sold, and conveyed to said Samuel in fee, this Patch farm in Wenham, with the usual covenant and warranty, dated August 17, 1785, all which being read &c. the tenant said, that as to the replication, the father on that day conveyed to said Samuel in fee, said farm described &c. "not only in consideration of the sum of money therein expressed, but also as, and for a full advancement to the said Samuel, as his part and portion of the estate of the said Francis, the father; and he, the said Samuel, then and there, by his said deed, did accept (said farm) as such advancement, and in full satisfaction of his said share and por-

tion of the estate of the said Francis, the father"—*hoc paratus*. CH. 178.  
To this rejoinder the demandants demurred generally, and Art. 19.  
joinder; rejoinder adjudged good.

Counsel made three points: 1. As to the pleadings: 2.  
Has the tenant proved a legal advancement? 3. Did the son's  
deed bar him?

1. The demandants urged that the advancement was not  
well pleaded &c.; the tenant urged that a full advancement  
was well pleaded, and relied on Willes, 131; 2 Burr, 832,  
Rix v. Royall; demandants denied their demurrer, admit-  
ted this Patch farm to be accepted as a full advancement,  
as they denied this matter was well pleaded; tenant on this  
point relied also on Stra. 817; 1 Com. D. 348; 4 Com. D.  
73, 74; 3 D. & E. 474; 5 D. & E. 465, Burleigh v. Stubbs;  
and argued that his plea was not traversed, answered, or  
avoided; that the conveyance of the farm was for the son's  
portion as well as the £233. 6s. 8d.; and relied on 4 Co. 176;  
2 Co. 76, Cromwell's case; 4 Co. 1, Vernon's case, to prove  
that a further consideration may be proved when it stands  
with that named in the deed; so the portion in addition to  
the £233. 6s. 8d.

Eaton v.  
Southy.

Palmer v.  
Ekins.

Mildmay's  
case.

2. The demandant contended the tenant had not proved  
a legal advancement; as since the act of March 9, 1784, there  
can be admitted no evidence of advancement but that men-  
tioned in it; the tenant contended that the act did not exclude  
other evidence, and went largely into the construction of the  
act, and other laws on the subject. So was decided.

8 Mod. 78.—  
10 Mod. 345,  
379.—4 Co. 1.

3. *Did the son's deed bar him?* The demandants contended  
it did not, as when he made it, he had no interest in the lands  
demanded, hence his deed could not operate as a grant, a feoff-  
ment, or as a release. The tenant answered, that is like many  
other new cases; it must stand on its own ground, and be gov-  
erned on general principles;—relied on 4 Burr. 2312, Justice  
Willes' opinion; and the opinion of Lord Mansfield, Dougl.  
277; the authority of several courts in construing contracts in  
law and in equity, also statutes; Dougl. 22; 2 Com. D. 480  
to 484; there was no question as to the parties' intentions;  
and if ever to be carried fairly into effect, they must be in  
these family affairs; the son clearly barred in equity, not on  
the ground of a release, nor of *estoppel*, for there are none  
in equity; but on general principles, and because a person  
never can have two things rightfully, when one has been given  
him, and accepted by him, in lieu of the other. The tenant  
did not rely on the deed as a release, aware that merely as  
such, it could not operate, as the son, living the father, had no  
interest in the estate; 3 D. & E. 370; Co. Lit. 353; but as  
to an heir's barring himself when he has only a hope of suc-

Lampet's  
case, 10 Co.  
46.—3 D. &  
E. 370, Good-  
title v. Morse.  
—3 D. & E.  
88.—8 Mod.  
258.—1 Co. 1.  
D. 197.

CH. 178. cession, an expectancy, the law had been long changing to  
 Art. 20. favour the intention ; and to bring the case nearer to that of  
 dower, living the husband. The heir's feoffment bars him, made  
 living his ancestor, because he shall not claim against it. So  
 his deed with warranty bars so made, formerly held on the  
 ground of circuitry of action ; but modern cases state, that  
 deeds without warranty equally bar as those with. The cases  
 cited, Co. Lit. 353, 365 ; 2 P. W. 445, were cases in which  
 the heir's deed was viewed as a mere release, and no bar ; as  
 a release, as such in law can have no operation, but on an  
 existing interest, and its operation in law is to pass or extin-  
 guish an existing interest or right ; hence when neither can  
 exist, this kind of deed can have no effect ; and if no deed of  
 an heir can operate but as a release, on some interest to bar  
 him, when the estate descends to him, then his feoffment or  
 deed with warranty would not bar him ; but the authorities  
 are otherwise.

ART. 20. *Pleadings in inquests of office, or informations of intrusion.*

§ 1. In such suits brought to cause the State to be reseized of lands granted by it, on conditions to be performed by the grantee, there is often occasion for special pleas in bar, on account of such conditions alleged by the deft. to be performed.

§ 2. As proceedings in these cases are grounded on certain statutes, it may be material to state the substance of them.

§ 3. This act provides, that if the commonwealth grant lands &c. on condition mentioned in the grant, and the State shall claim to be revested, by reason of the breach of conditions, an inquest of office shall be taken in the Supreme Judicial Court, in the manner pointed out in the act, in the county where the land lies. The attorney-general, on the directions of the legislature, shall file an information, stating the cause, and such breaches of conditions as the legislature shall order, and the court shall issue a *scire facias* to those who are said to hold the land, to be served thirty days before the court ; and the act points out the further process and judgment. If decided for the State, the judgment is, that the State be reseized, and execution issues for costs.

§ 4. By this act it is left to the attorney-general to assign the breaches. By the act of 1791, if it be only alleged, that the deft. holds more land than he ought to hold, and this be found by verdict or confession, the court may appoint proper persons to set off as much as he ought to hold under the grant, at his expense, and on their return made. the court

Mass. act,  
 June 18,  
 1791.—  
 Maine act,  
 c. 148.

Mass. act,  
 June, 1796.

may hear the parties and confirm, or not, as the case may be: Also, by this act of 1791, in all other cases where an inquest of office is necessary by law, to entitle the State to hold lands &c., such inquest shall be taken by the Supreme Judicial Court in the county where the estate lies, on information of the attorney-general, stating the title &c. The proceedings to be as above; except where there is no tertenant, notice is to be published &c. If decided for the State, the judgment is, that it be seized, and execution issues for costs; but otherwise, costs for the deft.; and if judgment be, that the State be reseized or seized, the State immediately thereon shall be deemed and taken in the law, to be in fact, seized of such lands &c. to all intents: Also by this act, if the State be entitled to lands for condition broken, there must be process against the party in possession, and in all other cases, where an inquest of office is necessary by law, there shall be process against such party; therefore, the question may often arise, when is such inquest necessary. And,

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Art. 20.

§ 5. 1. It cannot be necessary where the State is in possession by its tenant, or otherwise.

§ 6. 2. It cannot be necessary where the land is vacant, and nobody in possession; for then the law deems the State in possession, because it has the title. But

§ 7. 3. This or some process is necessary, for the State to gain possession of lands where it is entitled to them, in all cases when the possession is not in the State, or is not vacant, but full; that is, where there is the possession of some person not under, but adverse to, the State's title. This act directs the title of the State to be stated, in all cases, in the information filed by the attorney-general.

It seems to be clearly settled, that the State does not fully acquire the lands of one, even an alien, till inquest of office found. See Aliens &c.

§ 8. But in this case several distinctions are taken, and several points decided: 1. That when the king's tenant, seized of lands in fee, dies without heirs, the fee and freehold is immediately after his death, and before office found thereof, cast upon the king; for in such case it ought to be in some person, and if any person enters into the land, and takes any of the profits, an information of intrusion for the king may be preferred against him, before office or seisure; for the king immediately, by the death, is in actual possession, and has not only a freehold in the law as a common person in such case has;" and this difference was argued "when the king's tenant dies in possession, without heir, so that in such case *possessio est vacua*, and in nobody, there the law will adjudge the king in actual possession immediately; but when

4 Co. 54. case of the Wardens and Commonalty of Sadlers.

CH. 178. another is in *seizin* and possession, at the time of the *escheat*,  
 Art. 20. so that *possessio plena est*, and not *vacua*, there the king shall not be adjudged in possession, till this *seizin* and possession be removed; as if the king's tenant is disseized and dies without heirs; or if an alien born, or the king's villain, or the alienee in *mortmain* is disseized, and all this is found by office, in these cases the king shall not be in possession, until the possession and *seizin* of the *tertenant* is removed." If the king lease to A for life, and he dies, in this case the possession shall be actually in the king, without any entry or seizure; and when no man is in possession, it shall be adjudged to the king according to his title.

§ 9. 2. The various ways are stated by which the king may be entitled to estates; as by attainder; by alienation in *mortmain*; purchase by alien born; by death without heirs &c.

3. Shews where one may not traverse, or must have his petition of right in nature of his real action, to be restored to his freehold or inheritance, as to the king; but where the inquest of office, at common law, found for the king; the title or other interest in the same office, of the party, was also found, there he might have his *monstrans de droit*; because his title appears by the same record by which the king is entitled. The same if land be granted to the king on condition, to be performed of record, and the party has so performed, or the performance is found by office, he has this *monstrans de droit*.

6 Co. 63,  
 Page's case.

§ 10. Held, in the case of an alien &c. the inheritance or freehold is not vested in the king till office found, and that an alien, surviving joint-tenant, shall hold the lands till office found. The same principle has been adopted in this State.

Common-  
 wealth v.  
 Prescott &  
 al. Cumber-  
 land county,  
 1798, S. J.  
 Court.

§ 11. *Pleadings*. This was an inquest of office for condition broken in the case of Shepherd's grant, made on condition, March 8, 1777. The information was in common form, stating the grant and conditions, the grantee's *seizin* under it; profert of the resolve making the grant; and alleging the grantee did not perform the conditions, but broke them, whereby the State had good right to be revested of the lands; that the defts. hold a part &c. described as assigns of Shepherd; prays process against them, and that the State be re seized, and for costs.

Besides the general issue, the defts. pleaded a second plea in bar, as to part, in a special form, as in the subjoined note: \* also a third plea, as in said note. The object of each in-

\* And the said James, Oliver, and George, by leave &c., defend &c., and further say, that as to part of the tracts in the information last described, bounded &c.; by any thing by the attorney-general in the information al-

formation, is to cause the Commonwealth to be resealed of the lands it has previously granted on condition, for condition broken, or in other cases, to cause it to be seized. CH. 178. Art. 21.

ART. 21. *Title and seizin &c., how pleaded.*

§ 1. In pleading title or seizin in real actions, whether by demandant or tenant, plt. or deflt., voucher or vouchee, it is material to regard certain technical expressions, well formed by time and experience, to express the point in the case, and well suited to each kind of estate, and apply to all parts of pleadings in land actions.

1st rule.—If one allege a title in himself in the freehold or inheritance of lands, in possession, he ought to say, *he was seized*. Co. Lit. 17.—1 D. & E. 96.

§ 2. 2d rule.—If he be seized in fee, he ought to say, *in his demesne as of fee*; if in tail, *as of fee tail*; if for life, *seized for the term of his life*. Co. Lit. 42.—5 Com. D. 335.

§ 3. 3d rule.—If one have “the seizin in fee, it is sufficient to allege that generally, because that gives him a good title against all men except the disseizee;” “but now particular estates are not framed by the law, but by contract, therefore you must shew what that contract is,” and how it come to be made. 12 Mod. 191, Silly v. Dally.

§ 4. 4th rule.—If one allege seizin of things manurable, as lands, tenements, or rents, &c., he ought to say, *that he was seized in his demesne as of fee*. Lit. sec. 10.—5 Com. D. 335.

leged, the Commonwealth ought not to be resealed of the same, because they say that the General Court of the late State of Massachusetts Bay, in and by a certain resolve, passed on June 24, 1779, wherein the said General Court did, among other things, recite the resolve or grant, in the information mentioned, and that one of the conditions of the grant, was, that the said Alexander Shepherd jun., should furnish said State with an accurate map of all the late province of Maine, to the acceptance of the General Court; and that he had executed a plan of the said Province of Maine, to the acceptance of the General Court, and presented it for acceptance to the said General Court, and it was accepted; and it was confirmed to him, his heirs, and assigns forever, by the following bounds, viz.: he fulfilling the conditions in the said grant; which said tract last described, includes the part first above mentioned; and this they are ready to verify, wherefore the said J., O., and G. pray judgment &c. Demurrer to this plea, and held bad, as the State did not waive the breach of condition.

And as to the residue of the tract in the said information, last described, the said J., O., and G. say that by any thing by the attorney-general, in the information alleged, the Commonwealth ought not to be resealed of the same, because they say, that the said Alexander Shepherd jun., did, on the said last day of September, 1777, deliver to the said General Court, to its acceptance, an accurate map of the description in said information mentioned, according to the condition aforesaid, and thereof the said J., O., and G. put themselves on the country, and the said Commonwealth doth the like. In Dowland v. Slade & ux., 5 East, 272, it is said “the tenant, generally speaking, is to begin, and shew he has more mere right “than the demandant;” and generally as to opening and closing, we do not seem to have followed the English practice.

CH. 178. § 5. 5th rule.—But if seized of things not manurable, as of  
 Art. 21. an advowson, reversion, or remainder, after an estate for  
 life, he ought to say, *he was seized as of fee and right*. Pl. Com.  
 181; 5 Com. D. 335; Pl. Com. 191; 5 Com. D. 335, 394, 395.

§ 6. 6th rule.—But if one be seized of a reversion, after a  
 term for years, he may say, *he was seized as of fee and  
 right*; for he has not the occupation: also, he may say, *in  
 his demesne as of fee*; for he has the possession of the free-  
 hold, and may have had an assize.

27 H. VIII. 4. § 7. 7th rule.—If the estate be to husband and wife for life,  
 —5 Com. D. and to her heirs, it ought to be alleged, that *by virtue  
 235. whereof, they were seized to them, and the heirs of the wife  
 in her right, and husband and wife in her right in fee*. See  
 Polyblank v. Hawkins.

5 Com. D. § 8. 8th rule.—If one alleged possession of a term for years,  
 335.—1 D. & or other chattel real, he ought to say, *he was possessed*.  
 E. 96.

F. N. B. 1.— § 9. In a writ of right, the highest writ in the law, and  
 3 Bl. Com. which lies only for a fee simple estate, the demandant de-  
 Appen. 2 & 3. mands the estate “as his right and inheritance;” and he  
 —3 Wils. 419. must allege his ancestor was seized of right, as well as that  
 —5 East, 272. he “was seized in his demesne as of fee;” but he states no  
 —F. N. B. 1 disseizin, but only that the deft. unjustly deforces him. On  
 & 2, notes.— the *mise* joined, the issue is, whether the deft. has better  
 6 East, 272.— right to hold the estate to him and his heirs, as tenant there-  
 3 Bl. Com. of, as he holds the same; or the demandant to have the  
 196, 305.— same as he demands it. But it does not appear to be decid-  
 Booth, 85, ed, whether claiming the estate as his right and inheritance  
 111, 112, 113. does not render the allegation, seized of his right, unneces-  
 —5 East, 289. sary. The verdict finds the demandant has more right to  
 —3 Bl. Com. have the estate to him and his heirs, as he demands it, than  
 196, Appen. the deft. to hold it, as he now holds it. 2 Saund. 45; 4 Co.  
 5, 6.—See art. 8: Plt. must prove his seizin.

3 Bl. Com. § 10. This writ of right lies principally in four cases. It  
 191 to 194.— lies concurrently with all real actions, in which an estate of  
 Co. L. 281, fee simple may be recovered; and it also lies after them.  
 293, 294.

Lit. sec. 478. An infant disseizor may recover in a writ of right against  
 —5 East, 289. his alienee; “for as between such parties the disseizor has  
 the greater right.”

3 Bl. Com. The fourth case in which a writ of right lies, is where the  
 191.—3 Com. demandant is barred from his possessory action, by length  
 D. 644. of time, or acts of limitations.

3 Bl. Com. § 11. In the pure writ of right, the demandant must state  
 196.—F. N. seizin in himself, or some one under whom he claims, and  
 B. 3.— then derive, his title, from such person, and this seizin  
 3 Com. D. must be within sixty years; and this writ must be brought  
 544, 545.—1 against him who has a freehold in the land.—By our late  
 H. Bl.

statute forty years. The actual seizin must be by taking *the esplees* or profits. CH. 178. Art. 21.

§ 12. One in possession of land need not shew any title or consideration for such possession, against a wrongdoer or mere stranger; otherwise, against the owner of the soil. *Blakely v. Slater*, Cro. Car. 575; *Land's case*. In a writ of right by four nieces and co-heirs of J. S., they must state and shew how heirs, as well as that the land descended to them. Nor need the deft. in ejectment shew title against a plt. whose title is expired. 4 D. & E. 682; *Bul. N. P.* 110: or where the deft. proves a title out of the lessor; id.; for in such case the deft's. possession is sufficient for his defence; but then the title out of the plt. must be a subsisting one; and if an ancient lease for a thousand years, be the third person's title, his possession under it within twenty years must be proved. *Bul. N. P.* 110. Clearly in ejectment, the plt. must recover on his own title alone, not on the weakness of the deft's.; "for possession gives him a right against every man who cannot show a good title." 5 D. & E. 107, 110, *Martin, lessee of Tregonwell v. Strackean*. These cases are clear; but the difficult question is, if the plt. can recover if the deft. can show a superior title in a third person, with whom he does not claim any privy; or rather if the deft. can be permitted to show such title. The point is not settled fully. The second mortgagee sues the mortgagor, he is not allowed to show the title of the first mortgagee to bar the second, the deft. being barred by his own act to aver he had nothing in the land at the time of the second mortgage. See Ch. 178. a. 23, s. 22; lessee had owned his lessor's title, so not allowed to show title in a third person. 7 *Johns. R.* 157, 160; 10 Do. 292. The same estoppel by acknowledgment. *Doe v. Clark*, 14 East, 488. On the principle, one holding the land under the lessee cannot deny the lessor's title. See *Jackson v. Bush*, Ch. 136. a. 19, s. 12. A in possession of land, covenants with B, to pay him for it, B is estopped to allege an outstanding title to bar A's ejectment. 14 *Johns. R.* 224; see *Knox v. Jenks*, Ch. 104, a. 3, s. 28. One in possession of land A died seized of, cannot set up his heirs' title, to defeat his administrator's sale of it. It is clear the plt. in ejectment must show he has a good possessory title; as mortgagee, for instance; and if he assign and then sue the mortgagor, he may plead the assignment, and shew the mortgagee (plt.) has sold to a third person. See the case at large, Ch. 112, a. 5, s. 18; this case is direct to the point, but proves the title in the third person must be pleaded, and is not in evidence; but to plead title, to bar the plt., in a third person, he must have a legal, not a mere equitable

1 Wils. 326,  
*Kenrick v. Taylor*.—1  
*Burr* 440,  
*Warring v. Griffith*.—2  
*Bos. & P.*  
463.—3  
*Johns. R.* 1,8.  
6 *Wheat*, 580.

4 *Burr*. 2484,  
*Haldam v. Harvey*.—  
See *Doe v. Pegge*.—See  
Ch. 228, a. 3,  
a. 4.—*Bul. N. P.* 110.—1 D.  
& E. 358.—2  
D. & E. 684.

10 *Johns. R.*  
223.

*Gould v. Newman*.

*Wolcot v. Knight & al.*

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Phelps v.  
Sage.

Bateman v.  
Allen, 4  
Taun. 547,  
Catteris v.  
Cooper.

Forms, Regis-  
ter, 238 to  
244.—1 Mod.  
219.—3 Co.  
53.—4 Com.  
D. 234.—8  
Co. 170, 176.  
—3 Bl. Com.  
192.

5 Com. D,  
712.

Formedon,  
Ch 129, a. 3,  
case of Dud-  
ley.—Ch.  
185, a. 5, s. 5.

title; same principle, Ch. 178, a. 17, s. 6; and the plt. may reply, that nothing passed by his deed to the third person, Ch. 167, a. 9, Everenden v. Beaumont; and 5 Johns. R. 489; see Ch. 99, a. 27. Same principle in Connecticut. These cases on the whole, prove that if the plt. legally convey his estate to a third person, and then sues in ejectment or entry sur disseizin &c. the deft. may plead the plt's. conveyance to the third person, in bar of the plt's. action; for the settled principle is, the plt. must show a subsisting title to enable him to disturb the deft's. possession. Gould v. Newman, was a writ of entry; though the deft's. possession is *prima facie* evidence of title, yet it is not title against the plt's. prior possession. The elder possession is the better title. Cro. El. 437, 481; and Ch. 132, a. 7, s. 11, Allen v. Rivington. Held, a mere prior occupancy of land, though recent, gives title to the occupier on which, as plt., he may recover against all the world, except one having an older and better title. 8 East, 353; see Ch. 178, a. 23, s. 24; Ch. 104, a. 4, s. 6; Ch. 178, a. 23, s. 17: Where held a mere intruder on land, is not allowed to defend on title in a third person. Ch. 137, a. 17, s. 11.

§ 13. *Per formam doni*, or writ of *formedon*, is by 13 Ed. I. c. 1, is in the nature of a writ of right, the highest tenant in tail can have, and lies for him where the estate is discontinued and the remainder or reversion thereon is displaced by the failure of the particular estate. Is in *descender*, *remainder*, and *reverter*. If tenant in tail alien, or is disseized, his heir has *formedon*, in *descender* against the actual tenant of the freehold, and the heir must state the form of the gift in tail: so it lies for him in remainder or reversion, after a prior estate for life or in tail is at an end, against one who intrudes on the land. The reversioner or remainderman in fee or in tail states the whole form of the gift, and the event that lets in his action, in all which cases many *technical* expressions are used. General issue is, *ne donas pas*. Lut. 851.

§ 14. In all these actions in *formedon*, or *secundum formam doni*, the party claiming the estate in *descender*, as the heir in tail does; or in remainder, as the remainderman does, after the prior estate in tail, is at an end; or in reversion, as the reversioner or donor of the prior estate, or his heir does, claims a limited estate, but growing out of the general fee simple; whoever, therefore, thus claims as plt. or deft., must begin with the fee simple, state it, in whom it was, and that such a one was seized in his demesne as of fee; for only out of such a seizin, can an estate tail be carved, or only from such can it be derived; and when derived from this absolute fee, it is very material always to recollect, that it is

never done by act or operation of law ; but in every instance by the acts or contracts of the parties. If by devise, it is by the act of the deviser and acceptance of the devisee in tail ; if by deeds, then by the contracts of the parties, directly entered into. It follows in order to shew the derivation of this special limited estate in tail, and it must ever be done in pleading an estate in *descender*, remainder, or reversion, in *formedon*. It is necessary to state such devise or deed in order to shew how the particular estate is created, the creation of which only gives rise to this estate in *descender* &c., but by reason of this, the possession of the land cannot be claimed or defended in remainder or reversion, while the particular estate exists, as while that exists the rightful possession is in the owner of it, whether for life or in tail ; hence, he who claims or defends possession of the land by reason of his estate in remainder or reversion, must plead or shew the particular estate is terminated, at an end, or no longer exists, or strictly that the owners of it are extinct ; as if the tenant for life is dead, or that the tenant in tail is deceased without issue ; and finally, he who claims or defends as owner of this estate in *descender*, remainder, or reversion, must plead or shew how he is such, in order to shew he is entitled to recover it, or hold and retain it, as the case may be.

The principles, therefore, of pleadings in these numerous cases of these particular estates, as also of these estates in *descender*, remainder, or reversion, are few and simple.

§ 15. The declaration in this case was in substance *formedon in descender*, though in form a writ of entry *sur disseizin in the per*. In this declaration, the essential principles above mentioned, are stated, as far as necessary in an action brought by the heir in tail. The seizin in fee, the creation of the estate in tail, and the demandant's right as heir in tail to whom the estate in tail descended ; but as he had not been seized of the estate within twenty years before the action brought, it became necessary for him to state an entry on the lands (in 1775) within thirty years before he commenced his action, and as his entry was more than twenty years before he sued, he was barred in *formedon* ; hence, he found it necessary to bring entry *sur disseizin in the per*, stating the tenant had not entry, but by Joseph Kent, who demised to him, and thereof unjustly disseized the demandant ; and one plea was, he did not disseize ; another, a former judgment upon *formedon* in the *descender*, in bar to this new action. In this case, too, may be seen the manner of pleading a former judgment in bar, and the possession and seizin under it, by the party in whose favour it was rendered, and on his

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Kent v. Kent,  
2 Mass. R.  
338.

3 Bac. Abr.  
504.—Lutw.  
781, Hunt v.  
Bourn.—  
Salk. 339.—  
2 Salk. 422.

CH. 178. death the descent of the estate to the deft.; and special demurrer to such plea, pointing out seven defects &c. in the record of the former judgment pleaded in bar; and the great allowance the court made for inaccuracies in our more ancient pleadings. See cases of *formedon*, American Prec. 308, 311. In *Kent v. Kent* will also be seen, most of the essential principles of the plea of a former judgment in one real action, in bar of another. See also, *Dingley v. Dingley*, Ch. 114, a. 30; *Dudley's case*, Ch. 129, a. 3; and *Dow's case*, Ch. 108, a. 5.

§ 16. *Redisseizin, writ of, and post disseizin.* It has been made a question, if these writs can be sued out in this state; but on observing they were not writs at common law, but writs grounded on certain English statutes, it will be found, on attending to the provisions of those statutes, that these writs cannot be in use here.

20 H. III.c.3. By this statute it was provided, that if one deceased, recover seizin, and be again disseized by the same disseizor, he shall have the writ of redisseizin, and if he recover therein, the redisseizor shall be imprisoned. An early Colony law provided a summary process.

52 H. III c.8.- § 17. And this statute provides he shall pay a fine.  
13 Ed. I.c.26.

3 Bl. Com. 188. And this act provides he shall pay double damages to the party injured; for after judgment obtained, the redisseizin is a contempt of the court.

§ 18. So far there has been nothing inconsistent with our principles of law or practice, in adopting these statutes, and in considering a redisseizin a contempt of court.

Register, 206. § 19. But to carry these statutes into effect, the English have adopted forms and proceedings which our statutes do not admit of; as in the Register, there is provided a writ of redisseizin, directed to the sheriff, stating the plt. recovered seizin of the land against the deft., and that the deft. has again disseized him thereof, commanding the sheriff to take with him the *posse comitatus*, and to go in person to the land, and inquire by his jury, if the deft. had made redisseizin; and if he had, to imprison him, and give the plt. seizin and double damages by the oath of said twelve men.

§ 20. So in the Register of Writs there is a writ of redisseizin of common of pasture; and for again making stagnant waters, after judgment of abatement, as a nuisance between the parties; and for again diverting the plt's. water-course, after he had recovered against the deft.; and a like inquiry by jury, and a like punishment: so of ways again obstructed or straightened: so of *estovers* &c. This redisseizin seems sometimes in the English books to be called *post disseizin*. It will be observed that the sheriff's jury is essential in Eng-

land, in carrying the statutes into execution in these cases of *redisseizin* and *post disseizin*; and that no provision is made in Massachusetts for the sheriff, or any officer, to impanel a jury in such cases; hence this process of *redisseizin* or *post disseizin* cannot be adopted in this state. Nor are any traces of practice on these ancient statutes recollected here.

ART. 22. *Pleas of former judgment in bar.*

§ 1. See the last article, also Ch. 146, a. 5.; Ch. 148, a. 1; Ch. 166, a. 5; Ch. 165; cases of former judgments pleaded in bar, mostly in personal actions. As personal actions are all on a level, a judgment in one, for one and the same case, is usually a bar in another; but it is not so in land actions, except in those of the same degree.

§ 2. The principle is this, that no one shall be twice vexed if it appears to the court that it is for one and the same cause. Hence a bar in a real action of the same nature, or in a personal action by judgment, confession, verdict, or demurrer, is perpetual, and may be pleaded in bar of an action of the same degree, brought for the same cause; but in real actions, an action of a higher nature may be brought; but in several cases one barred in one real action may bring another of a different degree; therefore, if one be barred in *formedon in descender*, he may bring *formedon in remainder* or *reversion*; not so much because these actions (all *formedons*) are of degrees different, but because quite another title is tried in *formedon*, in *remainder*, or *reversion*, very different from that tried in *formedon in descender*. In fact it is more the point tried, than the different nature of the action. Hence a recovery or bar for rent in case or covenant, is a good bar in debt; for whether the action be case, covenant, or debt, the point tried in all is the same. But this former judgment, to be a bar in a future action, must be on the merits and rights, and not merely where the action is misconceived, as where one sues as administrator, when he ought to sue as executor. So where the former judgment is given on the manner, and not upon the matter of the plea.

§ 3. So if a matter be sued, but not tried, real or personal, it is open, as where the plt. sued a note, and also an account, and proved only the note, and recovered it; held he might afterwards sue the account as a matter not tried, and as a matter the plt. offered no evidence to prove on the former trial. In this case, Lord Kenyon said, the "plt. who brings a second action for the same demand, ought not to leave it to nice investigation to see whether the two causes of action be the same; he ought to shew, beyond all controversy, that the second is a different cause of action from the first, in which he failed." So a recovery in *formedon in descender*, is no bar

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Ferrer's case,  
6 Co. 7.—4  
Bac. Abr. 114,  
115.

6 Co. 33.

4 Bac. Abr  
115.

4 Bac. 115.  
2 Lev. 210.

6 D. & E.  
607, 610, Sid-  
don v. Taton.  
—2 Johns.  
R. 227, 210.—  
2 Bos. & P.  
69.—7 Johns,  
R. 20.—'0  
Do 365.—  
Hob. 94.—11  
Johns. R. 530,  
136.—16 Do.  
432.

CH. 178. in *mort-d'ancestor*; the plt. in the two actions may shew very different titles. 14 Johns. R. 96; 16 Do. 136.

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§ 4. If A and B commit a trespass or convert goods, and the plt. recover judgment against one, it is a bar in the action against the other, for by the judgment the uncertain damages are reduced to a thing adjudged. If the former suit fail for defect of form, judgment therein against the plt. is no bar.

Cro. Jam. 73.

6 D. & E. 613.

If A recover certain goods against B, A is barred to recover the same from C; Yelv. 67. —3 Ins. 226.

§ 5. In this plea of a former judgment in bar, the deft. pleads *actio non*, because &c. then states the record in the former action at large, or at least the material parts, if very long, as by the record and process in the same court, at —, remaining appears—*hoc paratus* &c.; if for lands, he avers the lands in the two actions are the same, and not divers, that the said P. in the said record of recovery, aforesaid, above named plt., and the said P., now plt., are one and the same person, and not other or divers; same as to deft.—*hoc paratus*, prays judgment if the plt. for one and the same cause, ought to have his action against the deft.

§ 6. Judgment in a former action against the plt. often bars him, and may be pleaded in a second action, brought by him, on the principle the former judgment changes the nature of his demand, as above, where it reduces uncertain damages to *res adjudicata*. So when the former judgment determines the contract for the same sum. In this case, the plt's right and demand, once founded on a contract, are no longer so; but now are founded on the judgment; nearly on the same principle, if one owes me one hundred dollars on simple contract, and I take a bond of him for the same sum and debt, the simple contract is merged or extinct, because the bond is a contract of a higher degree, as the judgment is superior to any contract; and the one is merged in the other, and gone, because of the difference in degree; therefore, one contract is not merged or affected by another of the same degree for the same thing; therefore a note given for goods sold, does not extinguish the simple contract of sale, unless negotiated; but that may be sued notwithstanding the note, if not agreed, it should extinguish such contract; the same principle holds as to bonds, one does not affect another, nor does an account stated, bar the action on the account current.

Pow. on  
Con. 423.—  
Stra. 733.

1 Esp. 150.—  
1 Burr. 9.

4 Co. 43,  
Hudson's  
case.

§ 7. This case clearly proves, that the second action being of a higher degree, makes no difference, if it be for the same cause; this was an appeal of *mayhem* against Lee, and declared that the deft., January 8, 28 El., feloniously maimed him in his left hand &c; the deft. pleaded in bar, that before the appeal, the plt. brought trespass of assault, battery, and wounding, and recovered so much on a plea of not guilty; and averred the battery and wounding in the action of tres-

pass and said *mayhem*, whereof the appeal is now brought, "was all one, and not several." Held a good bar, though admitted the appeal was of a higher nature than the action of trespass, and the court said, "in all cases where the plt. for a wrong or injury is only to recover damages, he shall not be twice satisfied for one and the same thing, *nemo debet bis puniri pro uno delicto*;" but in this appeal, and in the trespass, the plt. only recovers damages, and it appears by the deft's. bar, the plt. has admitted by his demurrer, the plt. recovered in trespass damages for the *mayhem*, "for the wounding included the *mayhem* and more," and the deft. has averred the wounding in the trespass and the *mayhem* in the appeal were all one.

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§ 8. A recovery or bar, in assize, is a good bar in another assize; but not in *mort-d'ancestor*—nor is a recovery in *mort-d'ancestor* a bar in a writ of right.

4 Ed. 3, 45.—  
F. N. B. 5.

§ 9. So a former judgment in an assize may be pleaded in bar in a writ of entry, in the nature of an assize; for both are of his own possession, and of the same nature, between the same parties. So in *ayle*, is a bar in *besayle* or *cosinage*; for these are *ancestrel*, and of the same nature: *a fortiori* will be a bar in an action of an inferior nature. So if one be barred in an action of his own possession, as in assize of *novel disseizin*, he may have assize of *mort-d'ancestor*, or entry *sur disseizin* to his ancestor. So if barred in a *dum fuit infra etatem*, he may have a writ of entry *sur disseizin*. So if barred in an action on the seizin of his ancestor, he may have a writ of right. So if tenant in tail be barred in *formedon* by verdict or demurrer, the issue shall have a new *formedon*; for he claims not only as heir, but also *per formam doni*; though the actions be of the same nature; for as the tenant in tail has but a qualified right, if there be judgment against him, it cannot be pleaded in bar to another action, even of the same degree, brought by his heir or his successor; for the heir or successor does not claim solely under the title or right of this tenant in tail; and on the same principle, if he be barred in a writ of error by his own release, the issue shall have a new writ of error.

6 Co. 7, Ferrer's case.

1 Com. D.  
146.—1 Co. 7.  
—6 Co. 7,  
case of Ferrer.

§ 10. So if a demandant in a real action be barred by judgment, he may have another action for a *collateral* right, as if a wife be barred in assize, she may have a writ of dower, and the former judgment cannot be pleaded in bar to her action for dower.

Th. D. L. 11.  
c. 38, s. 9, 10.  
—1 Com. D.  
146.

§ 11. So in actions real, if the demandant or plt. has judgment against him on verdict or demurrer, on a plea to the writ only, and not to the action of the writ, this cannot be pleaded in bar to another action of the same kind brought by him.

7 Co. 8.—5  
Co. 33.

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6 Co. 7, Fer-  
rer's case.—  
2 Mod. 42.

1 Leo. 24.—

1 Com. D.  
147.

§ 12. So if one mistake his action, and judgment against him, this cannot be pleaded in bar to a second action of the same kind; as if one bring *formedon in remainder*, when it should be *formedon in reverter*, and judgment against him; yet he may have *formedon in reverter*; for by the mistake, his first action could not try his true title. So if the plt. be barred in his first action by default of *venue*, for he loses on a defect in form, and not on the merits or real trial of his title.

§ 13. So, though it be averred in the plea in bar of a former judgment, that the land in the second action is the same as in the first, yet if by the records, they appear to be different, as if the land sued for in the first be laid to be *near Tunbridge*, and in the second *in Tunbridge*, a judgment in the first is no bar, though averred the same land was put in view, if the plea was not to the land put in view, but generally *nul tort &c.* for the plea might not be to the land put in view.

§ 14. These are good general rules, and evidently in all the cases of pleas of former judgments in bar of another action, we are brought to this material question, to wit: Does the demandant or plt. come to try in his second action, the same points and title he tried in the first? Now this question is not to be decided by mere names, as trespass, appeal, trover, *assumpsit*, *assize*, *formedon*, *entry sur disseizin*, *ayle* or *besayle*, *writ of right*, &c. but from a comparison of the records in the two actions, and ascertaining if the demandant or plt. goes in both on the same facts, points, seizins, or rights, or titles; if he do, the rule *nemo debet bis &c.* applies; if he do not, he is not barred, and this rule does not apply.

§ 15. And in our real or land actions, there is peculiar need of caution in regard to these pleas; because we have, and especially formerly, so confounded all kinds of real actions; for in *Starkie*, as above stated, *Beckford and wife* brought an action in the name of ejectment against the tenant of the freehold; but in fact it was a writ of right in substance, and they tried in it all their points and title as fully to every intent, as if their action had been, in name and technically in form, a writ of right; now had they been barred in the action they brought by a judgment against them, and had brought another action in name and technically in form, a writ of right, there can be no doubt but that they would have been barred, and the judgment against them in their ejectment, as they called it, according to the then practice, would have been pleadable in bar of their second action, called and formally framed as a writ of right.

Willes, 199,  
Ladbroke  
v. James.

§ 16. In pleading the judgment of a writ of a court of inferior jurisdiction, it is necessary to state those facts that give it jurisdiction, and having done this the party may allege generally,

that the court gave such a judgment, or did such an act, as discharge the deft. &c. 2 Johns. R. 363, *Peeblis v. Kittle*. CH. 178. Art. 22.

§ 17. A owed B \$1785 for goods sold &c. and to other creditors; January 1, 1793, A gave a bond to C and D for \$22,500 on account of all his debts, including B's debt; on this bond a judgment was entered, April, 1793; July 18, 1793, A gave B a single bill for the \$1785; August 1, 1793, B affirmed the trust in C and D as to the judgment, and August 2, directed a *ca. sa.* to be issued against B on this judgment, on which A was arrested and discharged with B's consent; B sued on the single bill, and held he was barred; for as B had no *cestui que trust* of the judgment, he had affirmed and elected to proceed on it. Hence his bill was discharged.

§ 18. In an action before a justice, the deft. pleaded a former judgment for the same cause of action before a justice. In the first suit the jury found a verdict of no cause of action; held, as this was substantially for the deft. though informal, and though the justice rendered no judgment on it, it barred the second action; the justice should have given judgment on the verdict, as he could not arrest the judgment nor grant a new trial. So a verdict is evidence against the deft. in ejectment, though no judgment be entered thereon, if he acquiesce in it by paying the costs and giving possession. 6 Binney, 420, *Shaeffer v. Krutger*. 2 Johns. R. 181, *Felter v. Mulliner* — 191, *Young v. Overacker*.

§ 19. Parties in this action bound by a survey &c. in a former action, made by order of court, though the plt. in this action was not a party in that, but holds under the proprietors of Bakerstown, defts. in that action (inquest of office) by the Commonwealth. The question was, if the lands Gerrish demanded were within Bakerstown or the grant to Sheppard. In said inquest of office a certain line was fixed as the north-westerly line of Bakerstown, contained in said survey, made by order of court in that suit. Held, "that this location was conclusive not only as a decision between the Commonwealth and the Bakerstown proprietors, but also conclusive against all persons claiming under the Commonwealth by any subsequent grant" &c. Hence, after grantees are "concluded by boundaries finally assigned by judgment of law to any prior location as *privies*, even when not parties, to a judgment between the Commonwealth and the proprietors of any former grant or location." Judgment for the defts.

20. *Entry sur disseizin*;—lands in Minott, a part of said Bakerstown. In 1794, in an inquest of office by the Commonwealth v. Proprietors of Bakerstown, the judgment fixed their limits with a proviso in favor of settlers. Held the plts., claiming under said proprietors, were bound by said judgment, and that the deft. was a settler within said proviso. 11 Mass. R. 202, *Cushing & al. v. Hackett*.

2 Johns. case, 195.—7 do. 75, *Seaman v. Haskins*.—10 Johns. R. 365, 366.

11 Mass. R. 193, *Gerrish v. Bearce & Cane*.

11 Mass. R. 202, *Cushing & al. v. Hackett*.

CH. 178. ART. 23. *Several other cases of pleas in bar &c., in real or land actions; for ousters of, or forcements as to the freehold or inheritance.*

Co Lit. 331.—  
3 Bl. Com.  
172, 173, 174.

§ 1. *Deforcement* is a word of extensive meaning, and according to Coke, is any wrongful withholding of, and from, the right owner; and according to Blackstone, is when the entry of the present possessor was lawful, but his detainer is now unlawful; though the original wrong is abatement, intrusion, disseizin, or discontinuance, or any other species of wrong to the freehold, whereby he who has right is kept out of possession; but as distinguished from abatement &c. it is only a detainer of the freehold from him who hath right of property, but never had possession under that right, and excludes abatement, intrusion, disseizin, and discontinuance. It is *deforcement* to deny dower to one entitled to it: so if tenant for years or for the life of another, after the end of the term, keep possession: so a third person refuses to let the lessor enter, it is a *deforcement*: so if a minor, or one insane, alien his land, the alienee's detaining it, is a *deforcement*: so two co-parceners, and one enters before the other, and will not suffer her to enter, this is a *deforcement*: so A seized of land, covenant to convey it to B, and neglects or refuses to do it, and remains in possession, this is a *deforcement*: so to keep a man out of a freehold office, is a *deforcement*. In fact *deforcement* is a good word in concluding most declarations in real actions, brought to recover the demandant's freehold or inheritance; and is the proper word in all such declarations, where he does not go on the ground of abatement, intrusion, disseizin, or discontinuance; and even, when either of these originally existed, but the tenant wrongfully detains the land, to say he deforces the demandant is true, and would, perhaps, be good after verdict, or on a general demurrer, as presenting matter only for an informal issue; but would be bad alone on special demurrer, where the disseizin or illegal entry ought to be put in issue, as not technically averring the specific wrong whereon issue ought to be; but I say *alone*; for if *deforcement* be alleged, also the disseizin &c. then the declaration presents the true ground whereon to go to issue.

§ 2. Cases applicable to this head decided and stated in the preceding chapters. *Martin v. Woods*, Ch. 131, a. 4; *Kent v. Kent*, Ch. 178, a. 21; *Wolcot & al. v. Knight*, Ch. 178, a. 17; *Everenden & al. v. Beaumont & al.* Ch. 167, a. 9; *Commonwealth v. Pejepsco Proprietors*, Ch. 178, a. 16; *Killieran v. Brown*, Ch. 1, a. 7; *Dudley v. Sumner*, Ch. 119, a. 4, s. 5; Ch. 129, a. 3; *Dow v. Warren*, Ch. 108, a. 5, s. 19.

§ 3. A common recovery is a record, and so must be pleaded entire, and must be shewn to be a good recovery; and the party pleading it, plt. or deft., must plead it was executed; for till execution of it, the tenant in tail is seized as he was before; and if a special verdict find a common recovery, but does not find a writ of seizin or execution, no advantage can be taken of the recovery; but execution may be sued out, though the tenant in tail dies before recovery executed.

Christian name of the vouchee amended by the deed to lead the uses and fine, and if he sue before the summon to warrant is returned, the recovery is void.

§ 4. *Formedon*.—In *formedon in descender*, if baron and feme were both seized in tail, the issue must demand as heir to both; but if one was in tail, and the other for life, he must make himself heir to him in tail only; and the demandant must make himself heir to him last seized in tail, or by force of the entailment, and must mention every one in his pedigree, who was seized in tail, or had a right descended to him, by force of the entail; and every one seized by force thereof ought to be named, son and heir, or brother and heir &c.; and if named, cousin and heir, must be shewn how cousin; but if a son die in his ancestor's lifetime, he need not be named in the pedigree; but a son surviving and is seized, and dies without issue, his brother need not shew he died without issue, but it is enough to name himself son and heir; nor need it be said by express words, the ancestor is dead; for son and heir supposes it; also the demandant must shew him who was last seized to be heir to the donee; and not sufficient he be named son only, but must be heir also. In *formedon*, by husband and wife the descent must be alleged to her only. See *Selwyn v. Selwyn*, Ch. 104, a. 2; 8 Co. 88.

§ 5. *In remainder or reverter*.—In *formedon in remainder*, the demandant ought to mention all *mesne* remainders, and must state the prior donee died without issue, if tenant in tail; and in reversion he must state his pedigree from the donor, and in this he must allege the *esplees* in the donor and in the donee.

§ 6. If tenant in tail discontinued, the *formedon* shall say, *remanset jus*; if not, *quod tenamenta remanserunt*; and in *formedon* in remainder or reversion, the demandant need not name the issue of the donee, but it is sufficient to say that the donee died without issue; and it is said, Hob. 1, if the *formedon* in reversion or remainder be by husband and wife; the reversion may be laid to her only, or to both.

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5 Com. D. pl. 3, A. 8.—Lut. 833, 963, 1550.—Stra. 185, Lewis v. Witham.—Co. L. 361.—1 Co. 94.—2 W. Bl. 1280.—1 Wils. 35.

Reg. 238, 239, 243.—8 Co. 1 88.—Dyer, 216.—F.N.B. 212, 487.—Hob. 1.—Cro. Car. 435.—5 Com. D. pl. 3, E. 2.—Chipman 74; by confession of lease, entry, and ouster, the operation of the lease is not confessed.—If the plt. declare on a lease and proves a title in fee, he fails.

He may declare for the whole and recover a moiety. Id. 33.—F.N.B. 220, 504.

F. N. B. 220.—8 Co. 86.—Dy. 216.—8 Co. 88.

CH. 178. § 7. But if the remainder is executed, the demandant may  
 Art. 23. have a *formedon in descender*, without stating the prior remainders. Where a bad deed, to make a tenant to the precipe, appears, the court will not presume a good one. 8 Co. 88; Reg. 243, 244; 2 Stra. 2267.

5 Com. D. 712, § 8. Pleas are not only the general issue, *ne donas pas*,  
 pl. 3, E. 4.— but also special pleas; as a common recovery; also a gift  
 Co. L. 384. after a disseizin, and after the gift, a recovery by the disseizee; and exchange of lands by the ancestors of the parties, and that the plt. has the lands given in exchange: so an estate prior to the gift may be pleaded in bar; and after the gift a *remitter* to this prior estate: so that the donor was seized after the gift, and made an estate to the tenant &c. in fee: so, a warranty by way of *rebutter*: so a feoffment with warranty and assets; and if *formedon* in remainder or reversion, a collateral warranty; and if the *formedon* be of a moiety, though it shows the uses of the other moiety, the deft. need plead only to the moiety demanded.

And Co. L.  
374.

And Sav. 86.

3 Johns. R.  
223, Jackson  
v. Dobbin.

§ 9. If the deft. in ejectment &c. confess he went into possession under one of the plt's. lessors, he may recover. It being a matter of fact for the jury to decide whether the deft. holds under any of the lessors of the plt. or not; and if the jury infer from the evidence he does, he cannot defend in this action. And 3 Johns. R. 499.

Cowp. 473,  
Weakley v.  
Bucknell.—6  
D. & E. 554.—  
2 Eq. Ca. Abr.  
357.—19 H.  
VI. 46.

§ 10. A agrees in writing, not stamped, to make B a lease for twenty-one years. B enters and has possession eighteen years, under this agreement, without any lease being demanded or tendered; held, this agreement and possession is a good defence against ejectment or other action, merely possessory brought by A; and if he were to recover at law, equity would immediately set the matter right. It seems by the agreement, B was entitled to a lease, and chancery would order one given by A, therefore a court of law would not allow him to recover the possession of B, when another court would, in another suit, direct a lease and possession, of course, to be delivered back to B.

7 D. & E.  
433.—  
1 Caines' R.  
444.—1 Dal-  
las. 126.

§ 11. Wherever an entry upon land is necessary in order to ground an action to recover, that entry must be averred and proved, or confessed before the action is brought. If not so, the deft. has a good defence. If the deft. has recognized the plt. as his landlord, he cannot dispute his title.

Chipman, 69.

§ 12. The deft. in ejectment must confess lease, entry, and ouster, for all the tenements demanded in the declaration. Confession of a part cannot be allowed. It appears from this and many other cases that the English action of ejectment is adopted in Pennsylvania, as well as in New York &c. very much in the English form, and on English princi-

ples. Is almost the only action for trying titles to lands in Pennsylvania. CH. 178.  
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§ 13. Held, the court will not suffer a lessee to defend alone, on ejectment against his own landlord, or those claiming under him, on a supposed defect of title; as where John Harrison, June 28, 1732, devised to his wife Ann, for life, remainder to Mary Pembroke for life, remainder to his grand-daughter Ann Pembroke in tail, remainder to devisor's own right heirs: life estates ended, and Ann Pembroke married to David Lance, being in possession, they levied a fine 1752, to their use. She died March 1753, not leaving any issue, and July, 1753, D. Lance leased to the def't's. father for eleven years, he paid rent to Lance, who died November 17, 1772. Def't. paid to the plt's. lessors claiming under Lance's will to October 10, 1772, afterwards refused, being forbid by J. and W. Harrison's heirs of the first testator, who claimed the estate but made no entry to avoid the fine. Harrison's heirs should have been made def'ts. 2 W. Bl. 1259.  
1 Dallas,  
67, Driver  
v. Lawrence.

§ 14. In an action to recover mortgaged premises, the mortgagor cannot set up a third person's title against the mortgagee, nor the tenant that of such person, to bar or defend against his lessor. 1 D. & E.  
759, note.

§ 15. A, the owner of the lands, contracts with B, and he under this contract makes improvements; A's devisee brings an action to recover them, and well secured; and B has no defence, but must look for recompense to A's personal representative. And 2 Phil. Evid. 170; 2 Barn. & Ald. 371; Goodright v. Rich, 7 D. & E. 334. 1 Johns. Ca.  
231, Van  
Allen v. Rog-  
ers—Doe v.  
Stanton.

§ 16. In ejectment to recover lands, the tenant cannot defend on an equitable title against the plt's. legal title, especially if such equitable title be doubtful. And 2 Johns. R. 221, Jackson v. Peirce; 3 Johns. R. 424; 8 Johns. R. 487, Jackson v. Van Slyck. 2 Johns. Cas.  
321, Jackson  
v. Sisson—  
See Ch. 125,  
a. 4.

§ 17. If the def't. in ejectment defend on an outstanding title, it must be a present subsisting and operating one; if not, the presumption is, that such a title in a stranger has been extinguished; and such a title in certain Indians of the *Mohawk* tribe was so held, as it had never been claimed, and the tribe had become extinct. Nor is the possession of the native Indians, such an adverse possession as will render subsequent alienations by patentees of the land possessed by them, void, on the ground of maintenance. 3 Johns. R.  
375, Jackson  
v. Hudson.

Nor will a mere intruder on land be allowed to defend on such a title in a stranger to protect such intruder's possession: nor can such a title be set up where there has been an adverse possession twenty years; and a title which could not be set up by a person while in possession of land, cannot be

CH. 178. set up by another person's coming into possession under him. A parol partition actually executed is binding.

Art. 23.

2 Johns. Cas.  
353, Jackson  
v. Cuerden.

§ 18. B, the supposed owner of the land, permitted A to occupy it many years; he afterwards applied to C, as the true owner, to purchase of him, and requested to be considered his tenant. C brought ejectment against A, to recover the land; held, he might defend by shewing he applied to C by mistake, and to prove the title not in C, though A could not set up an adverse possession.

3 Johns. Cas.  
295, Jackson  
v. Wilson.

§ 19. 1786, the landlord in ejectment against his tenant, holding under a lease containing a clause of re-entry for non-payment of rent, recovered judgment against the casual ejector by default, under the statute, and possession thereon delivered to the landlord, who leased and gave possession to another tenant, and the first tenant, in 1790, brought ejectment against this second tenant for the same premises. Held, the judgment by default was *prima facie* evidence of a regular and sufficient bar.

4 Johns. R.  
230, Jackson  
v. Bard.

§ 20. A took possession of land on an agreement with B, for a purchase, and C afterwards took possession under an agreement with A, for a purchase. Held, C's possession was not adverse to B's title. Where the possessor's declarations are evidence against him.

4 Johns. R.  
390, Jackson  
v. Schoon-  
maker.—7  
East, 311,  
312, 319.  
—1 Caines'  
R. 159, Jack-  
son v. Bowen.

§ 21. The court in this case decided, that neither a descent cast, nor the act of limitations, will bar or affect the right of him in remainder or reversion, while the particular estate continues; nor can the acts or *laches* of the tenant in possession affect the party entitled in remainder; (but the remainder must not be contingent, or if it be so, such act must not put an end to the particular estate.) Adverse possession twenty years or more, of a part of a lot, claiming the whole, is a bar in ejectment.

4 Johns. R.  
493, 496,  
Jackson v.  
Sules, 439.

In ejectment after judgment by default against the casual ejector, the landlord may be let in to appear and defend the action; and if an alien, when let in to defend, he is in time to petition to remove his cause into the Court of the United States. And if actions of ejectment, after judgment by default against the casual ejector, are removed into the Circuit Court of the United States, the state court will stay all further proceedings on such judgment until further order of the court. Default set aside to let in the merit.

6 Johns. R.  
34, Jackson  
v. Stewart.

§ 22. If A enter into possession of lands under B, and acknowledges his title, he never can set up in his defence in ejectment against him, an outstanding title in a third person.

8 Johns. R.  
361, Jackson  
v. Bartlett.

§ 23. In ejectment against a purchaser of lands under sheriff's sale, the regularity of the execution cannot be questioned.

§ 24. Ejectment against five defts., they all pleaded and defended jointly; evidence two of them occupied distinct parcels of the premises in *severally*, and the other three possessed the residue of the premises jointly. Held the plt. was bound to prove a joint possession of all the defts. And the two had judgment against the plt. *Quære*, if they had pleaded according to their claims? CH. 173. Art. 23.

2 Johns. R. 438, Jackson v. Hazen.

§ 25. The plt. claiming to recover on the ground of possession, must prove it clearly and unequivocally. The payment of taxes and the execution of partition deeds are not evidence of actual possession, though of a claim of possession. 3 Johns. R. 388, Jackson v. Mayer.

§ 26. The plt's. lessor cannot be a witness; evidence of the acts of the lessor tending to conclude him, and those deriving title under him, is admissible; may strike out his name if used without his consent. 4 Johns. R. 140, 143, Jackson v. Ogden.

§ 27. If the plt. in ejectment rest on a right by *descent cast*, so as to *toll entry*, he must prove a *tortious entry*, and expulsion of the true owner, or that the entry was not *congeable*. If not such, it has no effect; a mere entry is no disseizin. 6 Johns. R. 197, Smith v. Burtis.

§ 28. In ejectment, if the plt. rely only on a judgment of partition, and that is void, he cannot recover his undivided share, without making out a regular title, as if no judgment had been given. If one tenant in common sell to A., he must have notice of partition. 3 Johns. R. 459, Jackson v. Brown.

§ 29. If the deft. claim under A, and A confesses he went into possession under the plt's. lessor, the deft's. defence entirely fails him as to the tenancy. 3 Johns. R. 499, Jackson v. Scissam.

§ 30. Held in this case, that the rules as to the proceedings in ejectment as for vacant possessions in England, do not apply to the unsettled lands of New York. 1 Johns. Cas. 221, Saltonstall v. White.

§ 31. In ejectment, one having no claim, or any subsisting title to the lands in question, cannot be made lessor; but the person made lessor must have some claim or subsisting title to the premises: may be struck out. 10 Johns. R. 368. 4 Johns. R. 483, Jackson v. Richmond.

§ 32. A sheriff's deed which did not recite the record, was allowed to be given in evidence of title without producing the record. Though many of these cases in this article do not properly contain pleas in bar, yet as they contain a mixture of law and fact, they embrace matters useful to be attended to in land actions and matters. A deft. may often plead specially, if he chooses, especially by giving colour so as to bring matters involving real questions of law to be decided by the judges instead of the jury. 1 Dallas, 94, Burke's Lessee v. Ryan.

§ 33. Selwyn justly observed, that "special pleas either in bar or abatement are seldom pleaded in" ejectment, "because, according to modern practice, if the deft. appears, he generally enters into the consent rule, by the terms of 2 Selw. 650.

CH. 178. which he is bound to plead the general issue, *not guilty*." And,  
 ART. 23. as in England, and those of our States which adopt the Eng-  
 lish practice in regard to land actions, most land titles are  
 tried in actions of *ejectment*; we see the reasons why so very  
 few special pleas are to be found in our law books in real or  
 land actions.

§ 34. Further the deft's. main ground of defence is in this; in this action of *ejectment*, to wit, that the right of entry of the party claiming title, or a right to recover the land, is tolled or taken away. This is matter almost invariably in evidence. And then as soon as the tenant of the land, or he and his landlord, are made defts. on their request, the parties in *ejectment*, (*lease*, entry, and *ouster* being confessed) come at once to the inquiry, if the plt's. lessor had this right of entry at the time he really enters, to avoid a fine, as is necessary, or at the time it is admitted he entered. Now this inquiry, if the plt's. lessor so had this right of entry, involves many important matters, but not any special pleadings; this right of entry in the plt's. lessor may never in fact have existed; he may be totally mistaken in thinking he has, or had, the title or right of entry, or if he once had it, the same may be taken away in divers ways,—as by descent of the estate, by discontinuance, by fine and non-claim, or by the statute of limitations as to real actions in England, or here by descent, discontinuance, or this statute. But these matters are in evidence on the general issue, and have been, and will be, considered under the heads of Discontinuance, Entry, and Possession, Ch. 132. a. 2, 3, 4, &c. Limitations are considered.

§ 35. As every man is in possession of land according to his title, in contemplation of law, until he is *ousted* or disseized, till one of these happen, he can have no occasion to make a formal entry. Hence, his right to enter will commence not until he is turned out of the land, or until he is adversely kept out by one holding it, and denying his title; hence, the twenty years is to be computed from such *ouster* or disseizin, or adversely holding him out. This involves, in the action of *ejectment* and so in applying statutes of limitations in other actions, the inquiry often, what is an *ouster* or disseizin, or such holding out; these have been already considered.

3 Day's Ca. 4  
 25e, Fanning  
 v. Wilcox &  
 al.

§ 36. In Connecticut, actual *ouster* and adverse possession, uninterrupted for fifteen years, bars the original proprietor of his right of entry, whether the adverse possession were by the same person or persons for the whole term, or by different persons for different portions of it.

§ 37. A rightful title is not necessary to constitute adverse possession; though it must be a possession under colour and claim of title, and exclusively of any other right; and if A

enters, claiming as tenant in common, under the same title as that of the lessor, he admits it. Hence, neither B, nor those claiming under him, can set up such entry as adverse to the common title, or injurious to the rights of other tenants in common. 9 Johns. R. 174, *Smith v. Burtes*.

CH. 178.  
Art. 23.

§ 38. *How a mill privilege may be recovered in ejectment &c.* As where A conveyed land to B and reserved to himself, his heirs and assigns forever, "the right and privilege to erect a mill-dam at a certain place described, and to occupy and possess the said premises without any hindrance or molestation from the grantee, or his heirs" &c. Held this right so reserved was an interest in the land, recoverable in an action of ejectment: 2. General principle; wherever a right of entry exists, and the interest is tangible, so that possession can be delivered, ejectment lies to recover it; 6 D. & E. 359, and 106, for deft.; 7 Taun. 374.

9 Johns. R. 298, *Jackson v. Buel*, cited for the plt. Runn. 131, 132.—1 D. & E. 358.—2 D. & E. 452.—3 D. & E. 772.—4 D. & E. 671.—2 East, 190, Ch. Pl. 173, 188.

§ 39. Deft. makes affidavit that one of the plt's. lessors is dead, and was when the action was commenced. The plt. must show he is alive, or the court will order the counts stricken out of the declaration in which his name is inserted as lessor, and the time to move it is before joining in the consent rule, or even after; 1 Caines' R. 20.

Coleman, 105, *Ditz v. Butler & al.*

§ 40. *Change of possession &c.* An ejectment was served on A, tenant in possession, who soon after left the premises, and B, a new tenant, took possession; and the plt's. agent, without the knowledge of his attorney, served a new declaration on B. Held, this was a waiver of the suit against A.

Coleman, 109, *Fench & Kemble*.

§ 41. *Ejectment for a vacant lot*; sued for by the plt's. lessor, and he got a regular judgment by default. This was set aside, and the person claiming to be the owner of the land was admitted as deft. on paying costs, and making affidavit of merit &c. And in another case, the court in New York said, the strict principles applicable as for a vacant possession in England, cannot without manifest inconvenience, be applied to unlocated lands in this country.

9 Johns. R. 257, *Wood v. Wood*.—Coleman, 82; see s. 30.

§ 42. A writ of *habere facias possessionem*, presumed to be kept alive &c.; as where the plt. took out one on a judgment in ejectment, returnable in February, 1811, executed but not returnable. In May, 1812, the plt. sued out another on the same judgment. The tenant in the mean time retook possession of the premises. Held, though the year and day had elapsed between the term at which the first writ was returnable, and the issuing of the second, no *scire facias* was necessary to revive the judgment, as the court would presume the first execution was continued down on the roll to the time of issuing the second,—which may be done at any time, being matter of technical form.

9 Johns. R. 391, *Jackson v. Stiles*.

CH. 178. ART. 24. *Special pleas in bar &c. giving colour in these actions.*

Art. 24.

Ras. Ent. 277,  
b. 276, 272,  
249.

Ras. Ent.  
272. B. 5.—  
Booth on  
Real Actions,  
174 to 179.

§ 1. This we sometimes practise. It has been already observed, that *non-tenure* in abatement of the writ, is a good plea, as in all real actions. So another joint tenant who is alive, where our statute does not apply; so one may plead sole tenancy in abatement, and over in bar, *he did not disseize*; so the tenant may plead he never entered.

§ 2. *Non-disseisvit* is the general issue, in a writ of entry, in the nature of an issue, as in all actions in which a disseizin is technically charged. This writ brought for a disseizin done to the plt. himself in the place of an assize, is the writ of entry in *de quibus*,—for in the Latin counts, the plt. demanded the premises (describing them, and said), *de quibus*, the deft. unjustly and without judgment within thirty years last past, disseized him. But this writ of entry in the *quibus*, or in *de quibus*, grounded on a disseizin, might be brought against him who disseized the plt's. ancestor; also against him coming in under the disseizor; for a disseizin done to the plt. or his ancestor. In fact this writ in *de quibus* was in the *per, per and cui*, and *post*, as above stated; and according to F. N. B. the writ of *quibus* lay instead of assize, by tenant in fee, or his heir, whether disseized of lands, rents, or office; so by tenant in tail or for life &c. And after the plt. in the Latin and English translated forms, had thus alleged his disseizin, he proceeded in his count or declaration, and said, whereupon he (plt.) says, that he himself was seized of the said messuage &c. with the appurtenances in his demesne as of fee and right in time of peace &c. taking the *esplees* &c. Now this is in substance our form, only we transpose some of the sentences. We first state the plt. demands (in our best declarations) such premises, (accurately describing them,) then allege he was seized &c. of them, and sometimes add, though not materially, he ought now to be in possession of them; and then state his disseizin by the deft. and unjust detention &c. Now this is evidently the most natural order; for it is perfectly natural for the pleader to attend to his client's, the plt's., seizin, when and how he had it, and of what kind of estate, before he attends to his being disseized; and further the nature of the unlawful entry made by the deft. whether a disseizin or intrusion &c. or of this or that kind of estate, must in every case essentially depend on the nature and kind of seizin the plt. or his ancestor had. And we allege the disseizin as affirmatively as it was done in the old Latin forms. So that the allegation equally presents the proper matter for an apt issue; however it may be well in the *per, per and cui*, and *post*, to follow the old order of arrangement in some cases. To these and other numerous cases of declarations or counts, it is very seldom the deft. can

plead any special plea in bar, as descent, devise, or any way stating his title, that will not amount to the general issue; and so be bad on special demurrer; to plead such, and to avoid such demurrer, he must give *colour*, as above, in Quarles v. Quarles; so in Rastel's entries, it appears a deft. may plead a *descent* in bar, giving *colour* to the demandant; as thus the said J. C. deft., come &c. *actio non* &c.; because he says, that D. C. was seized of &c. in his demesne as of fee, and thereof died seized without heir of his body issuing, and after his death the said tenements &c. descended to the said J. C. deft. as brother and heir of said D., by which the same J. into the said tenements &c. entered, and was thereof seized in his demesne as of fee, and the plt. claiming the said tenements &c. by *colour of a certain deed of demise*, thereof made to him for the term of his life by said D., where nothing of the said tenements &c. passed into the plt.'s possession by said deed, he the plt. into the same tenements &c. entered, upon whose possession thereof the same J. afterwards into the same tenements &c. reentered &c.—*hoc paratus* &c.

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Art. 24.

Ras. Ent. 273  
a, 273 b.

§ 3. Plt. replied *precludi non* &c. and said certain other persons were seized in fee, and so seized, by a certain deed, demised the tenements &c. to one R. and his heirs for the life of M., remainder to J. C.; so pleads a long title &c. by recovery &c. to B and his deed to the plt.; deft. traversed this deed and issue. In this way, instead of trying the whole cause on the general issue, the special pleadings brought the trial to be on a particular deed or conveyance; and so the tenant may plead in bar, an entry into the estate by *escheat* for want of an heir, giving *colour*.

§ 4. An entry may be pleaded in bar by reason of an alienation by fine made by tenant for life; so entry by forfeiture; and the plt. may reply, and say not comprised in the fine.

Rast. Ent.  
280.

§ 5. So the deft. may plead in bar a sale by executors under power given by the owner's will, giving *colour*.

Ras. Ent.  
274.

6. So the deft. may plead in bar a feoffment giving *colour*. In the replication the feoffment may be avoided by a former feoffment by another; the deft. may rejoin that the feoffment was by disseizin and continual claim pleaded; the plt. may traverse the continual claim.

Ras. Ent.  
275.

§ 7. So the deft. may plead reentry on the plt. as in a writ of entry in the *post*, the deft. may plead he was seized until disseized by the demandant, and he the deft. reentered.

16 H. 7. 4.

§ 8. *As to writs of intrusion*, see them before described and stated. As to these the pleas in abatement, as to *non-tenure*, joint-tenancy, and sole tenancy, are as in other real actions. There is one plea in abatement peculiar to this writ, in Ras. Ent. 416, a. 4.

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Art. 24.

13 Ed. III. 19.

—Booth, 184.

Booth, 185.

§ 9. It is a good plea in bar in *intrusion*, brought by the heir, after the death of tenant for life, on a lease made by his ancestor, that this ancestor never had any thing in the land; but the demandant may reply and shew he was seized and demised; and issue must be on the seizin.

§ 10. So it is a good plea in this action of *intrusion*, brought after the death of the tenant for life, on a lease made by the demandant, to say that the person named tenant for life was tenant in tail of the gift of the deft., and that he died without issue, and he entered as in his reversion; *absque hoc*, that the person named tenant for life had any thing in lease from the demandant, at the time of his death.

§ 11. Many other cases of this sort may be found scattered in the books; but these cited are sufficient to explain the principles on which, in real actions, the deft. specially pleads in himself a good title, giving colour to the demandant; that is, allowing he claims under a deed which, if operative, would vest in him a good title, but which being inoperative, vests in him no title at all.

§ 12. Thus it appears by this fiction of colour, the deft. may specially plead in himself a good title (if he has it), in almost every real or land action, and of course so plead as to bring the action finally to be tried and decided on an issue joined on a single material point in law or fact, as the pleadings may happen to end in demurrer, as in *Quarles v. Quarles*; or in an issue in fact on the validity of a deed, as in the first case above cited from *Rastel*. Though the title of each party in the action may rest on scores of deeds, wills, seizins, &c.; as according to practice the parties in a writ of right, must join the *mise*, in which it is alleged the plt. has a better right to recover than the deft. has to hold, there seems to be no room for any other pleading in bar; and specially, as it has ever been settled, that on this issue or *mise* joined, every matter whatever is in evidence, except collateral warranty; this must be pleaded as said, because it does not prove any right transferred from the warrantor to the warrantee, but only rebuts and bars the warrantor of his right, by force of his covenant real; therefore, as the *mise* is joined on the mere right, and the jury on this mere right must give their verdict, they would be obliged on it, to find the right in the warrantor, as in the case there is no *miller le droit* out of him, but it remains in him, and he is only estopped, barred, or rebutted, by his warrant, or real covenant.

§ 13. Two reasons exist for this special pleading by giving colour in real actions. 1st, To draw the final decision to the

judges, which is done if the pleadings end in a demurrer, as they often may: 2. To avoid extreme prolixity in the trial on the general issue, which may often involve an immense mass of matter, as devises, deeds, seizins, disseizins, surveys, &c., and to bring the decision of the cause to be on one material point, to be decided by the judges, or jury, as the final issue may be in law or fact.

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Art. 25.



These reasons are sometimes weighty, and hence such special pleadings ought not to be precluded; but when almost all land titles were tried in replevin and trespass, anciently, the right to plead by fiction of colour was certainly abused. This fashion of pleading was carried to excess, as will be seen in the old cases and old books of entries. This abuse probably has its influence in forming the rule of consent in ejectment, that is, that the deft. on entering himself a party should agree to plead the general issue, as well as confess lease, entry, and ouster. Though some advantages may arise from special pleading in these actions, yet the deft. ought to be careful how he begins it. He may think there is one strong point in his defence on which he is entirely safe to put it; this may be so; or he may be mistaken as to this point. On argument and trial it may be found not his best point, or may shew but little of the strength of his whole defence, and he not be always able to get the final issue joined on this, he thinks his strong point; for the plt. by his pleadings on his part, specially, to which this pleading with colour is an opening, may get often this final issue on some other point; for if he offers a good issue, the deft. must join it, though it be not on the point he intended, when he pleaded specially giving colour.

§ 14. On the whole, when we consider the several essential changes in pleadings in real actions, there have been in the last five centuries, and that a vast deal of experience has so far ended in providing for the deft's. pleading the general issue, in ejectment, that is, in the action in which most land titles are tried in England, New York, &c. as above, we may fairly conclude the general issue is best, and preferable to special pleadings, in these real actions; excepting pleas of releases, former judgments, &c. applicable to all kinds of actions.

ART. 25. *Statute of limitations in real actions.*

§ 1. By this statute a writ of right was limited to sixty years. In assizes, writs of entry, or other possessory actions real, of the seizin of one's ancestor in land fifty years, and of one's own seizin or possession, thirty years. 32 H. VIII. c. 2.

§ 2. By this act, twenty years is the limitation in *formedon*: so twenty years in all ejectments, as no one can bring 21 Jam. I. c. 16.

CH. 178. ejectment but when he has a right of entry; of consequence  
 'Art. 25. he must sue within twenty years next after his right of entry  
 accrues; and by this statute of 21 Jam. I. c. 16, as well as  
 by our Massachusetts act of 1786, no entry can be made by  
 any man, unless within twenty years after his right of entry  
 accrued. These limitations were in force here in Massa-  
 chusetts, till July 4, 1786, when our legislature passed an  
 act on this subject, nearly in the words of the English  
 statutes.

Mass. act,  
 July 4, 1786.  
 —Act of  
 Maine, ch.  
 62.—Also ch.  
 47.—Ken-  
 tucky act of  
 Dec. 17, 1796,  
 fifty, forty,  
 and twenty  
 years; ten  
 years as to  
 minors &c.  
 as usual.

§ 3. This enacts, that no man shall sue "any writ of right, or make any prescription, title, or claim, to any lands, tenements, or hereditaments, or to any rents, annuities, or portions issuing therefrom, upon the possession or seizin of his or their ancestor, or predecessor beyond the term of threescore years next before the test of the same writ." Section 2. That no one shall sue "any writ of entry upon disseizin, done to any of his ancestors or predecessors; or any action possessory upon the possession of any of his ancestors or predecessors, for any lands, tenements, or hereditaments, unless the ancestor or predecessor under whom the demandant shall claim, should have been seized or possessed of the lands, tenements, or hereditaments demanded, within fifty years next before the test of the same writ, or bringing such action." Section 3. "That no person, or body corporate or politic, shall sue for, have, or maintain any action for any lands, tenements, or hereditaments, upon his or their own seizin or possession therein, above thirty years next before the test of the same writ." Section 4, provides, that all writs of *formedon* of any lands &c., shall be sued within twenty years "next after the title or cause of action first descended," and at no time after; and no person but by judgment of law, shall make any entry into any lands &c. but within "twenty years next after his right or title first descended or accrued to the same;" provided, if any person entitled to such *formedon* or entry, shall at the time his right or title first descended, accrued, or fell, be a minor, feme covert, *non compos*, imprisoned, or beyond sea; "without the limits of the United States," such person may sue and make such entry "at any time within ten years after the expiration of the twenty years aforesaid, and not afterwards." See the construction of this act, as to writs of *formedon* and disabled persons; they can bring no *formedon* after twenty years from the act's beginning to run. 6 Mass. R. 328. Dow jun. v. Warren; Doe v. Jones, 4 D. & E. 300; Walden v. Grats' heirs, 1 Wheaton 292; Cotteral v. Dutton, 4 Taun. 326; Peck v. Randal, 1 Johns. R. 165; Hall's lessee v. Vandegrift, 3 Bin. 374; see a. 11; Cruise on Fines, 258; Dillon v. Leman, 2

H. Bl. 584 ; Demarest v. Wyncoop, 3 Johns. Ch. R. 137 ; Ch. 178.  
Roe v. Rowllstone, 2 Taun. 441 ; 4 Day, 310. Art. 25.

§ 4. By this act of 1808, passed March 2, it was provided, that after January 1, 1812, the writ of right mentioned in the first section of the said act of 1786, should be sued in *forty* years instead of *sixty*. So the second section, act 1808, provides, that all writs of entry &c. on one's ancestor's seizin shall be sued within *thirty* years instead of *fifty*, named section 2, act 1786.

Mass. act,  
Mar. 2, 1808.

§ 5. These two acts clearly shew our grades of real actions. 1st, Writs of right limited to forty years : 2. Writs of entry on the seizin of the demandant's ancestor limited to thirty years : 3. Writs of entry on his own seizin, now the same, thirty years : 4. *Formedons* confined to estates in tail, in *descender*, and to remainders, and reversions, on estates in tail, become extinct, limited to twenty years, with the proviso above.

§ 6. This act of 1808 then, sections 3 & 4, makes those provisions which constitute the *betterment* act, provides, when any action is sued to recover lands or tenements, against one holding by possession and improvement, and he, or he and those he claims under, "has had actual possession above six years before sued ; and the jury finding for the demandant shall, if the tenant request it, ascertain the increased value of the premises, at the time of the trial, by virtue of the buildings and improvements made by such tenant, or those under whom he may claim ;" and if the plt. require it, "what would have been the value of the demanded premises" had no such buildings or improvements been made ; and if in the term this verdict is found in, the plt. on record abandon the demanded premises to the tenant, at this jury price, and he shall not pay it and interest, in a year after the verdict, plt. has his writ of seizin ; but if the plt. do not so abandon, he has no writ of seizin, except in one year he pays the said jury price, assessed for said buildings and improvements, and interest ; and if the plt. so abandon, and the deft. pays as above, he and his heirs have a good title forever to the premises, against the demandant and his heirs forever ; but if afterwards evicted by a higher or better title, after notifying the original demandant to aid in the defence and admit him, then such tenant or his legal representatives recover back what they pay, with interest. Provided, this act extend not to mortgages ; nor to any action instituted "against any person who shall hereafter enter upon any lands without a license from the owners of the soil ;" and such tenants are liable to waste, as in other cases.

§ 7. This act provides, the writ of seizin may be stayed, Mass. act,  
Mar. 2, 1810.

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Mass. act,  
Feb. 22, 1820.

6 Mass. R.  
303, Bacon  
v. Callender.  
—Extends  
not to a ten-  
ant by the  
curtesy; 15  
Mass. R. 291.  
—13 Mass. R.  
241.

Dow v. War-  
ren.

1 Dallas, 67.

6 East, 80,  
Doe v. Jes-  
son.—See a.  
3.

6 Johns. R.  
16, Jackson  
v. Hunt.—1  
Cain 328.—3  
Johns. R. 8,  
12, Jackson  
v. Vidder.

Salk. 423.—  
See 4 Co. 10,  
Bevil's case.

on the tenant's paying a year's interest and the principal, in three annual instalments.

This act allows the deft. to add to his time of possession, that of the tenant or mere possessor he holds under, to make out the six years' possession.

§ 8. The court held, that the provisions of this act of 1808, extend to the case where a tenant in a real action claims to hold under a title, which proves defective, as well as where he holds by virtue of a possession and improvement only. This action was as to a messuage in Boston, and the parties by their motions filed, required the jury to do what that act requires &c.; and the parties were tenants in common. This excluded by an agreed price.

§ 9. See Dow v. Warren, Ch. 108, a. 5; where an act as to *formedon*, once begins to run, no after event can interrupt its progress.

§ 10. Held, the act of 21 Jam. I. c. 16, and 32 H. VIII. c. 9, do not extend to Pennsylvania; and for the act to bar ejectment the possession must be *adverse*. But that 32 H. VIII. c. 2, does so extend, see *Embracery*.

§ 11. The ancestor died seized, leaving a son and daughter, *minors*; on the ancestor's death a stranger entered; the son soon after went to sea, and died abroad as supposed, *within age*. Held, the daughter was not entitled to twenty years to enter, after her brother's death, but only ten. More than twenty years having in the whole elapsed since the death of the person last seized. The court thought the right to enter accrued first to the son, and the law allows ten years to his sister, his heir, to enter after his death. She was of age before this ten years expired.

§ 12. A, by B's direction, entered into lands in 1779, which C claimed as his own; and he wrote a letter to B, who also claimed it, that when the times became more peaceable, he and C would have it surveyed, and if the land belonged to C, A should pay him rent &c. In ejectment brought by C, held, this letter did not suspend the operation of the statute of limitations indefinitely, but only during the war; and as there had been above twenty years' *adverse possession* since the war, C could not recover in ejectment.

§ 13. These acts of limitations as to real actions, are always in evidence; as it is the invariable practice for the demandant in his declaration, to state the seizin of his ancestor or of himself to be within sixty, fifty, thirty, twenty years, before the date of his writ; it becomes necessary of course, for him to prove the fact, then the only question is as to the kind of seizin, if such seizin as the statutes contemplate. And it is a settled rule, that a statute of limi-

tations never runs against a man, but where he is actually ousted or disseized. Hence, it has been decided, on 32 H. VIII. that one is not barred who has had *seizin in law*, within the periods. CH. 178.  
Art. 25.

§ 14. In this case it seems to have been the court's opinion that the acts of limitations, as to real actions, do not extend to actions of dower. A mortgage was paid off. 6 Johns. R. 290, Hitchcock v. Harrington.

§ 15. Lands descended to A, a *feme covert*, who had a daughter, C, born in 1756. A died in 1764, and B, her husband, died in 1786, tenant by the curtesy; C, the daughter, married D in 1783, and adverse possession was taken of the lands in 1772, then vacant, and not cultivated. C, after her husband's death in 1807, brought ejectment; held, that B being tenant by the curtesy, no right of entry accrued to C until after his death in 1684; and that C, then being *feme covert*, was not bound to bring her action in twenty years thereafter, but was protected by the statute during her coverture. 8 Johns. R. 262. 271, Jackson v. Sillick.  
See a. 23, s. 21.—Co. Lit. 29 a.

§ 16. The entry of *cestui que trust* is sufficient to avoid the statute of limitations. In an action against several defts. though they plead jointly, yet if their plea be in its nature severable, the plt. may enter a *nolle prosequi*, as to one, and proceed as to the rest. Salk. 422, Hunt v. Burn. One barred of his *formedon* may still enter &c. 1 Ld. Raym. 716, Gree v. Rolle.

§ 17. *Quod ei deforciat*. This was an ancient English writ, the principles of which may apply here in some degree, where the owner of a particular estate, as for life, in dower, or by curtesy, or in fee tail, was barred of the right of possession, by a recovery against him on default, or non appearance in a possessory action he was absolutely barred, and without remedy at common law, as the writ of right did not lay for this owner of a mere freehold for life, or one in tail, but only for the tenant in fee simple. To afford some relief, this statute was passed, and gave this writ of *quod ei deforciat* to such limited owners, or tenants, after their lands had been so recovered from them by default in a possessory action. This is not strictly a writ of right, but in the nature of one. But notwithstanding this statute, where the recovery was, or is not, by default; but on defence in the inferior possessory action, this recovery is still final with regard to such particular estates, as at common law. If then such particular tenant lost, or loses, on defence, this recovery against him has been, and is, a good plea in bar to his after action, even since the statute. 3 Bl. Com. 193, Law of Uses, 426 to 437.—6 Com. D. 155.  
13 Ed. I. c. 4.

§ 18. *Twenty years' adverse possession* is title for the plt. in ejectment, according to several cases; as where A had possession uninterrupted twenty years, then B got possession, 8 East, 353.—1 Burr. 119.—2 Salk. 421.—Cowp. 397.

CH. 178. but A recovered against him. See *Stokes v. Berry*; see 3  
 Art. 25. Johns. R. 269, *Jackson v. Diffendorf*; *Jackson v. Dobbin*;  
 ~~~~~ *Jackson v. Hagen*; *Jackson v. Meyers*. Thus, according to  
 these decisions a plt. may avail himself of the acts of limita-  
 tions, though clearly not within the reason of them, as  
 stated, Ch. 79.

4 Wheaton, § 19. *Seven years' limitation in North Carolina*. In eject-  
 230, *Somerville's ex'rs. v. Hamilton*. ment on the act 1715, by which held deft's. possession of  
 v. Hamilton. lands for seven years or more under title in himself, and  
 those under whom he claimed, was a bar against the action  
 of the adverse claimant, unless he brought himself within  
 Sugden, 270. some of the disabilities, as infancy &c. The rule in equity  
 is, that the statute of limitations does not bar a trust estate,  
 holds only as between *cestui que trust* and *trustee*; not if a  
 stranger be one party.

Clay v. Clay, § 20. *Limitations in equity in land actions*. In this case of  
 3 Bro. C. C. 639.—15 Ves. Clay v. Clay, Lord Camden said, "as often as parliament  
 jun. 496.— has limited the time of actions and remedies, to a certain  
 Damarest v. period, in legal proceedings, the court of chancery has  
 Wynncoop. adopted that rule, and applied it to similar cases in equity."  
*Middlecott v. O'Donel*, 1 Ball & Beatty, 156; and in New  
 York, said the chancellor, the construction of the statute of  
 limitations is the same in equity as at law. 3 Johns. Ch. R.  
 139; see *Lamar v. Jones*, 3 Har. & M'Hen. 328; *Lytton*  
*v. Lytton*, 4 Bro. C. C. 441; see *Doe v. Danvers*, 7 East,  
 299 to 324.

Beckford v. § 21. *As to trusts*. Though no time bars a direct trust, as  
 Wade, 17 between *cestui que trust* and *trustee*, yet it is clear where re-  
 Ves. jun. 97. lief would originally have been granted on the grounds of  
 constructive trust, it is refused to the party who after long  
 acquiescence, comes into a court of equity to seek relief.  
 4 Hen. & Mun. 139 to 145, *Spotswood v. Dandridge & al.*  
 Orrell v. Mad- To bar the plt's. claim in chancery by length of time, on the  
 dox, Run- ground the deft's. possession was *fiduciary*, it must have been  
 nington's *fiduciary* as to the plt. or those under whom he claims, be-  
 Eject. 468. ing *fiduciary* as to any other person is not sufficient. *Red-*  
*wood v. Riddick*, 4 Munf. 225; 2 Desaus. Ch. R. 55; 4  
 Do. 479, *Wambursee v. Kennedy*; *Cooke v. Darby*, 4 Munf.  
 144; *Grant & al. v. Duane & al.* 9 Johns. R. 591 to 614;  
 where, on lapse of time, payment may be presumed, and the  
 party barred in equity; see this case, Ch. 112, a. 7, s. 12,  
 and many cases cited in it.

Barnard. Ch. § 22. Where the *cestui que trust* and trustee are both out  
 R. 445.— of possession the time limited by the statute, the stranger in  
 Ambler, 645. possession adversely, has a good bar against both. *Town-*  
*send v. Townsend*, 1 Bro. C. C. 550; *Herey v. Ballard*, 4

Bro. C. C. 469; Goodrich v. Pendleton, 3 Johns. Ch. R. 390. CH. 178.  
Art. 32.

§ 23. It is now settled, that a man cannot call on a court of equity for a specific performance, unless he has shown himself ready, desirous, prompt, and eager; and therefore, time alone is a sufficient bar to the aid of the court. Cites 1 Vesey, 450; Milward v. The Earl of Thanet, 5 Ves. jun. 720; 1 Ball. & Beatty, 68. "And if the vendor be not ready with his abstract and title deeds at the day fixed, the purchaser may avoid the agreement at law." Berry v. Young, 3 Esp. Ca. 640 n. But this rule in equity does not prevail; for in equity it is as incumbent on the buyer to ask for the abstract, as for the vendor to deliver it, and if the purchaser do not call for it before the time is expired for delivering it, he is considered as waiving the time. Jones v. Price, 3 Anstr. 924. So if he receive it after the day appointed, and do not at the time object to the delay, he waives the time. 2 Anstr. 527; Seton v. Slade, 7 Ves. jun. 265. The general principle there must be no delay, on the vendor's part, to perform, is confirmed by other cases, as Lloyd v. Collet, 4 Bro. C. C. 469; 4 Ves. jr. 686, 691, Harrington v. Wheeler. The true principle seems to be in equity, for the party to perform at the time fixed, but "the conduct of the parties, inevitable accident, &c. may induce the court to relieve against the lapse of the day fixed for completing a purchase." 4 Ves. jun. 690, in a note; 1 Wheaton, 179, 207, Hepburn & al. v. Dunlap, and cases therein cited.

ART. 26. *Pleas proper in replevin.* These were largely considered, Ch. 17, under the head of Replevin, and many cases in replevin in various chapters in connexion with other matters.

ART. 27. *Pleas proper in review.* See Reviews considered at large, Ch. 189.

ART. 28. *Pleas proper in scire facias.* Scire Facias considered at large, Ch. 190.

ART. 29. *Pleas proper in trespass vi et armis.* See Trespass vi et armis, considered at large, Ch. 172 and Ch. 173, and various cases in trespass in sundry chapters in connexion with other matters. See Index, Trespass.

ART. 30. *Pleas proper in trover.* See Trover considered at large, Ch. 77, and many cases in trover in other chapters connected with other matters. See Index, Trover.

ART. 31. *Pleas proper in waste.* See Waste largely considered, Ch. 78. See Index, Waste.

ART. 32. *Pleas proper as to vouchers, ways, and various matters.* See the heads under which considered, and the words in the Index.

Sugden, 278,  
Alley v. Des-  
champs, 13  
Ves. jun. 225.  
—1 Johns.  
Ch. R. 375.

Guest v.  
Homfray, 5  
Ves. jun. 816.  
—Smith v.  
Burnam, 7  
Ves. jun. 278.  
—Ch. 115, a.  
10, s. 10,  
Radcliffe v.  
Warrington,  
13 Ves. jun.  
323.

CH. 178. ART. 33. *Several points further in land actions, as notice to quit &c.*  
 Art. 33.

7 D. & E. 717, Doe v. Wandlass—Ch. 151, a. 9.  
 § 1. Where a landlord or lessor has a right of entry for the non-payment of rent, he cannot, at common law, recover in ejectment, unless he demand the rent on the day when it becomes due, nor under 4 Geo. II. c. 28, s. 2, if there be a sufficient distress on the premises. Ch. 134, a. 4, s. 15, &c.

8 East, 190, Goodright v. Vivian.  
 § 2. In making a lease, if the lessor except *trees*, and reserve them, it cannot be waste for the lessee to cut them down, as they are no part of the leased premises; hence, ejectment lies not, as for waste committed in or upon the demised premises.

4 Cranch, 299, Alexand-  
 er v. Harris.  
 § 3. A lease for three years was averred, not supported by an absolute lease for one year certain, and two years further possession on the same term by consent of the lessor. See Dougl. 640; 1 D. & E. 378. Nothing in arrear is the general issue &c.

Willes, 43,  
 Legg v. Ben-  
 son.  
 § 4. Where a party is empowered to put an end to a lease by writting, he cannot do it by *parol* notice. King v. Saville, Brownlow.

1 D. & E. 54,  
 162, Right v.  
 Darby—  
 Messenger v.  
 Armstrong,  
 159, 163.  
 § 5. But where the time of a lease is to end on a precise day, there is no occasion for notice to quit; for the lease is at an end of course, if the parties do not make a new agreement. The lease was express for three years; the lessor gave notice to quit but this was necessary only to entitle the lessor to double rent for the lessee's holding over. P. 162.

Same rules,  
 8 East, 358,  
 362, Cobb v.  
 Stokes.—7 D.  
 & E. 31.—7  
 D. & E. 68.  
 If there be a lease for a year, at an annual rent, "then if the parties consent to go on after that time, it is a letting from year to year;" and the rule applies as well to houses as to lands. On such holding over there must be half a year's notice to quit. This was the rule as early as the time of H. VIII. The moment the tenant continues possession over the year, he has a right to hold to the end of the year, per Buller J.; and by Lord Mansfield C. J. "if there be a lease for a year, and by consent of both parties, the tenant continue in possession afterwards, the law implies a tacit renovation of the contract." And the lessor at the end of the time has a right to enter, but if he do it, with a strong hand, to dispossess the tenant by force, he may be indicted. No double rent specially demanded. 8 East, 358.

1 H. Bl. 97,  
 Roe v. Ward.  
 —7 D. & E.  
 63.—3 Bos. &  
 P. 2.  
 § 6. Ejectment for a messuage &c., John Jordan was tenant for life, remainder to his son, the plt's. lessor, for life, remainder over. The father, June 23, 1785, leased to the deft. by indenture, for twenty-one years to commence from April 5, 1785, that day he entered; September 30, 1785, the

A new count on a lease of a new lessor may be added on terms, to a declaration in ejectment; 2 Caines' R. 260.—Landlord in possession cannot have it to bar his absconding lessee; id. 335.—6 D. & E. 85, Doe v. Watts.

father died, and the estate came to the lessor, the son, the deft. continued possession, and paid rent to him for two years, April 5, 1786 and 1787, also at old Michaelmas day; before that day, 1787, the son gave the deft. notice to quit April 5, 1788. Held, this was evidence from which the court would presume an agreement between the son and the deft., that he should continue to hold from that day, and according to the terms of the original lease, so that notice to quit ending that day was proper. It was urged the new term between the deft. and son, began when his father died, September 30; and the lease from year to year implied, (as there is now in England, no lease at will) ended September 30, and the notice should have been to quit on that day, but as the deft. paid, and plt's. lessor accepted, rent April 5, the court inferred they renewed the terms of the old lease, as they paid and received rent according to it; yet on the father's death his lease was void. 2 Phil. Evid. 173.

§ 7. *Notice &c.* It seems to be a rule, if the lessor after notice given to the lessee to quit, accept rent due before the notice expired, it is no waiver of it; but if he accept rent becoming due after notice ended, or distrain for such rent, it is a waiver of the notice. 6 D. & E. 219. But then it must be paid and received *eo nomine*, as rent, or it may be left to the jury to decide with what intent received.

Ejectment on notice and pending it, second notice to quit the next year on a day named, by way of caution, is no waiver of the first notice, and the suit may proceed. 6 East, 120; 5 D. & E. 171; 1 D. & E. 380, 382; 7 East, 551. Notice to one joint-tenant to quit, is sufficient for both. Notice to the officers of a corporation, where sufficient. 3 East, 223.

§ 8. *Notice to quit if the lessor sold &c.* The lessor about to sell the estate, gave notice to the lessee to quit October 11, 1806, but promised him not to turn him off unless it was sold: not sold till February, 1807. Held, the promise (which was performed) was no waiver of the notice, nor operated as a license to be on the premises otherwise than as subject to the lessor's right to act on such notice, if necessary. And therefore, the tenant not having delivered up possession on demand, after a sale, was a trespasser from the expiration of the notice to quit. The landlord merely suspended his right under the notice till the sale, but did not mean to give up the benefit of his notice to quit, and his letter to the tenant in answer to his, was read in the trial as evidence of this; the letters were part of the *res acta*, and so evidence.

§ 9. *Notice to be given by tenant in tail and remainder &c.* A tenant for life made a defective lease under a power re- 261, 263, *Denn v. Rawlins*; the lessor's receiving rent from the lessee, may make him tenant from year to year, and he must have notice to quit; 9 Johns. R. 267, 330.

CH. 173.  
Art. 33.

1 H Bl. 311,  
Zouch v.  
Willingale.—  
Goodright v.  
Cordwent, 2  
East, 237.

Doe v. Hum-  
phrey, 2  
East, 384.

10 East, 13,  
Whitaker v.  
Symonds.

Notice was  
given by let-  
ter March 22,  
1806.

7 D. & E. 83  
—10 East,

CH. 178. serving the ancient yearly rent of £1. 18s. 6d., and died in  
 Art. 33. 1795; under this lease the deft., the lessee, claimed to hold;  
 the plt's. lessor, tenant in tail, received this rent from 1795 to 1805, up to Michaelmas; the rack rent value of the premises being £30 a year; this ejectment was brought in 1806. Held, the plt. could not maintain it, laying his demise on a prior day, without giving the lessee some notice to quit, so as to make him a *trespasser*, after such a recognition of a lawful possession, either in relation of tenant, or at least as continuing by sufferance till notice; the deft., without notice to quit, could not be a *trespasser* when the ejectment was brought, as the receipt of the old rent for ten years, by the plt's. lessor, proved there was a *tenancy* of some sort, though not from year to year, as decided in a former action; how it must be proved by the attesting witness. 2 Maule & S. 62; 10 Johns. R. 335.

6 Johns. R.  
 272, Jackson  
 v. Wheeler —  
 None to ten-  
 ant at will, 2  
 Caines' R.  
 170.—13  
 East, 210.—  
 5 Johns. R.  
 128, Jackson  
 v. Parkhurst  
 & al.

§ 10. *No notice where there is no tenancy between the parties.* Therefore if A enters on my land, and holds it *adversely*, or claims to hold it in fee &c. no notice to quit is necessary. In fact wherever one on my land denies he is my tenant, the rule of notice to quit does not apply, but only to one who claims to be my tenant; as where A enters on my land with my permission, as a *mere occupant without rent reserved*, and I sell it to B, under whom A continues in possession, and afterwards A sells all his right to D, he takes possession under A's deed; this disclaimer of tenancy dispenses with notice to quit, if before the demise.

3 Johns. R.  
 422, 423,  
 Jackson v.  
 Deyo.

*No notice need be given to a tenant at sufferance.* As where A by attorney leased to B for three years, that time being expired, B asked him if he had power to renew the lease, he said he had not, but B might continue possession till he heard from A. Held B was a mere tenant at sufferance, after his three years' lease expired, and not entitled to notice to quit before sued in ejectment. So one who claims to hold my lands in fee, disclaims all tenancy, and is not entitled to notice. So one who holds my land *adversely* is not entitled to notice, though he denies holding *adversely*;—as where the deft. had possession ten or twelve years, and about six years after he entered, one of the plt's. lessors told him he might continue in possession, and work on the land as his own, for he would sell it to him. At the trial the deft. denied he held *adversely*; yet held his entry was *adverse*, and *no relation of landlord and tenant existed*, so as to entitle the deft. to notice to quit before sued.

1 Johns Cas.  
 231.—4 Johns.  
 R. 186.

Nor is a mere *servant* or *baillif* in possession, entitled to notice to quit; Jackson v. Sample. No tenancy exists. If all the lessors join in the ejectment, it proves their agent's authority who gave the notice. 2 Phil. Evid. 184, 185.

§ 11. But *notice must be to quit*, where a *tenancy exists*,—as between *mortgagee and mortgagor*. Hence before the former can have ejectment against the latter to recover possession, he must give six calendar months', or a half year's notice to quit, where the mortgagor is in possession; not if no privity. No such notice in Massachusetts nor England; 3 East, 449; nor in New York, to the purchaser of the mortgagor's interest, or to the third person, between whom and the mortgagee there is no privity of contract or estate; 4 Johns. R. 215, 216, Jackson v. Fuller. Court not unanimous in Jackson v. Laughhead, and Dougl. 21; and it seems the decision was new in New York; Ch. 112, a. 5, s. 34.

So if A enter upon my lands, by my permission, but no rent reserved, and continue possession seventeen or eighteen years, and make improvements, he is tenant from year to year, and entitled to notice to quit. 2 Caines, 174, Jackson v. Bradt; 2 Caines, Er. 314; 1 Johns. Ca. 33, Jackson v. Rogers.

§ 12. But there may be a *tenancy*, though no specific agreement for a *certain quantum* of rent, and by *parol*; as in ejectment for messuage and land, on a lease laid May 14, 1802, made by the plt's. lessor, Jacklin; notice to quit September 24, 1801, the messuage &c. holden by the deft. of M. Atkinson, "at the end of the then current year of his tenancy." Atkinson owned the estate and agreed to sell it to the deft. let into possession May 12, 1801, (old May-day) and he paid £30 in part, failing in his purchase, he forfeited this £30; July 11, 1801, Jacklin with the deft. applied to Atkinson to buy the estate; Atkinson agreed to sell, but made a condition by *parol* that the deft. "should continue tenant not for one year only, but from year to year." To this Jacklin agreed by *parol*. He bought at £550, and the agreement reduced to writing, and witnessed by the deft. but *wholly omitted his tenancy*. Atkinson agreed to take the defts. forfeited £30 as part of Jacklin's purchase money. Held as the *deft's. tenancy*, so agreed to by Jacklin, the plt's. lessor, was collateral to said written agreement, was binding on him, and the agreement made a tenancy for two years at least, though no rent was then mentioned, but was to be settled afterwards; "and if that were not done, the lessor might recover upon a *quantum meruit*." See 17 John. R. 153, 300; all the lessors must join in the notice; 2 Phil. Evid. 184.

§ 13. No notice to quit on a lease for a year and no longer; lessor's assent not implied in the lessee's holding over;—as when, September 25, 1805, the plt. and deft. agreed the deft. should hold a messuage &c. "for one year and no longer," from June 24, 1805, to June 24, 1806; deft. entered and continued in possession during the time; also held over. And August 11, 1806, plt. gave notice to the deft. still in possession, and demand in

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2 Johns. R.  
75, Jackson  
v. Laughhead.  
—1 Johns.  
Ca. 33, 236.—  
4 Johns. R.  
215.

1 Johns. Ca.  
322, Jackson  
v. Bryon.—

4 East, 29,  
Dinn v. Cart-  
wright.

8 East, 356,  
Cobb v.  
Stokes.

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writing to deliver up possession to the plt., but the deft. did not, but held over three months; plt. recovered a year's rent from June 24th, 1805, to June 24th, 1806, but no rent from June 24th to August 11, 1806, being the fraction of a quarter and double rent after August 11, 1806, when said demand was made. Several material points were decided in this case: 1. No notice to quit was necessary during said year, or at the end of it, to put an end to the tenancy: 2. Though the tenant held over several months, it was not implied or inferred by the court, the lessor assented to such holding over; therefore he had a right to demand possession about fifty days after the year or term ended; because, as Lord Ellenborough said, the lessor "not having in the mean time done any act to recognize the deft. as continuing to be his tenant;" and this seems to be the true principle,—that is, the lessor must do some act implying at least his assent the lessee hold over, and not merely be silent, as it seems he was in this case, till August 11, 1806, that is, during the term, and for about fifty days after it ended; but in *Messinger v. Armstrong*, above, the court seemed to have inferred the lessor's assent from his silence, as to the lessee's holding over. In that case, Buller J. said, the moment the tenant continues possession over the year, he has a right to hold to the end of the year; and Lord Mansfield said, the law implied a *tacit* renovation of the contract. If so, why did not the law imply a *tacit* renovation of the lease, when Stokes thus held over, and Cobb was silent. The truth is, this presumption often made by the court, of a *tacit* renovation of the lease or agreement, has no foundation; for if I expressly lease a piece of land to A for a year, to end April 1,—both parties know it so ends; it is the lessee's duty by the very terms of his contract, then to give up the possession, and of course I have a right to expect, and he is a wrongdoer if he continue an hour after his lease ended. *It is true, if I know he is holding over*, my conduct may, or may not, afford evidence, I consent to renew the lease in England, New York, &c. so far as parol leases are valid; but there can be now no *tacit* renewal in Massachusetts, in its nature by *parol*, where a statute is express, that every tenancy is but one *at will*, where it is not sanctioned by *writing* signed; though otherwise in the province, as to leases not exceeding three years. See on this point *American Precedents*: 3. Stokes was viewed as a wrongdoer, and not as a tenant from June 24, to August 11, 1806, though it does not appear his continuing in possession was in that time objected to by Cobb: 4. It appears the lessor created *double* rent by demanding possession *long after* the term ended; but double rent only *after* the demand made. As to double rent in several of the United States, see *Rent*, Ch. 117, a. 5, s. 13.

§ 14. Tenant in common in Vermont may have a joint action of ejectment. Notice to a supposed purchaser; A agreed to sell land to B; one hundred dollars to be paid at the time of taking possession, and the residue at periods named. B took possession April 15, 1811, and then paid the one hundred dollars. A demised to D, who brought ejectment against B to recover possession. Held B was entitled to notice to quit before sued. 9 Johns. R. 330. CH. 178. Art. 33.

4 Cranch, 165, Hicks v. Rogers.

§ 15. *General principles.* In all land actions it is understood the plt. or demandant *sues to recover possession in fact, of the thing sued for.* It must then be of something of which the officer, on execution, can give possession either directly or indirectly: of what then can he give possession, and so for what does ejectment or other land action lie, may often be a question, and in this respect the principle is the same in England and in the United States; then English decisions are useful here. It is a settled principle, that nothing can be sued for and recovered in these actions *which cannot be touched and*

*seen—quæ neque tangi nec videri possunt*; because what cannot be touched and seen, the officer, on execution, can give no possession of to the plt., nor can he enter. Hence these actions never lie for *incorporeal* hereditaments, as above stated, as they are *invisible*, and *not tangible*; yet they are often recovered in these actions; and on two principles: 1. As *appendent* or *appurtenant* to the lands recovered; because the officer gives possession of them to the plt. by giving him possession of the land to which such hereditament belongs; this is the case of ways, commons, streams of water, for the land covered by it is sued for and recovered. Hence if one own the water and not the land under it, his only remedy, upon a disturbance, is an action on the case; so as to any other incorporeal hereditament he holds or has in another's lands, whereof the other has the right of possession. See the authorities above, a. 14, s. 1, 2, &c. There is another principle. If A have a limited right in B's land, A's right often carries with it some actual tangible possession of the land itself; as where B owns the land, and A has a *coal mine* in it; thus A may recover in ejectment or land action. It is not a bare profit *apprendre* out of B's land; this mine includes a portion of the land or soil itself deliverable on execution. So if A has a grant of the *prima tonsura*, or the first crop of grass that annually grows on B's land, and it is withheld from him, A may have ejectment for the land itself; for this first crop is the best profit and grant of the property. So A is esteemed the proprietor of the land itself till the contrary be proved; for 95.—3 D. & E. 772, Rex v. Tolpiddle.—Salk. 256.—1 Burr. 366, 629.—5 Burr. 37.—Cro. El. 854.—Cro. El. 818.—Cro. Car. 555.—Cro. Jam. 654.—Cro. Jam. 573.—4 Mod. 97.—11 Co. 25. 10 Johns. R. 270.—Notice to quit given by the lessor to his immediate lessee, continuing to pay him rent annually, is sufficient, though another person be in possession; Jackson v. Baker.—10 Johns. R. 335, one agreeing to purchase is entitled to notice if he pay rent accepted; 1 Burr. 127.—Cro. Jam. 150.—Noy. 121.—Salk. 255.—4 Mod. 143.—Cro. Car. 362, Ward v. Pettifer.—1 Wils. 14.—3 Wils. 30.—11 Co. 25.—Hard. 303, 401.—Dal. 2673.—Noy. 573.—4 Mod.

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Art. 33.



he has the freehold who has the best tonsure, and he who has the after pasture, bushes, &c. has "but the profits in the nature of a common"—A has the sole right of entry till the first crop is taken off. So it lies for the *herbage*, as the best profit, and the grantee of it has at all times a right of entry to take it. So a land action lies for pasture for one hundred sheep; that is, as much land as will pasture them; and the case of *Coffin v. Coffin*, Ch. 130, a. 4, s. 59, goes further; and 4 D. & E. 671; 5 D. & E. 329,—"*prima tonsura* is a tenement;" 3 D. & E. 775. So is a right to pasture twenty cows at £3 10s. per annum each, to be fed in certain fields a certain part of the year exclusively; 4 D. & E. 671; and see *Burt v. Moore*, Ch. 2, a. 5, s. 4; and in all these cases now, the plt. at his peril, is to shew the officer the thing of which he is to give him possession; 2 Stra. 1063; 1 Johns. C. 101; 1 Caine, 500; 1 Bin. 450; and in our land action, the jury may have a view of the thing. Ejectment lies for an *orchard*, because it is a word of known meaning, and the officer may well give possession of it on execution. So for a stable or cottage, for the same reason; so for a warehouse or chamber, or curtilage; so for a house; 3 Leon. 210; *Noy*. 109; 2 Stra. 795; *Cro. El.* 286; so of a close, if it have a known name, or is described; 11 Co. 55; *Cowp.* 349; *Cro. Car.* 435, 471; *Salk.* 254; 5 Bur. 2672; *Cro. El.* 186; 2 Stra. 834; 1 East, 441; 8 East, 357; 3 Mod. 238: lies for a part of a high way, that is, the land under it. See *Goodtittle v. Acker*; 2 Johns. 357; 2 Mass. R. 127; and see Ch. 228.

*Notes.*—Forms of declarations, pleas, &c. in land actions referred to declarations in ejectment; 10 Wentw. 41, three counts. Casual ejector's notice to the tenant in possession, 42. Declaration in ejectment on eight demises by tenants in common, eight counts, eight more counts and opinions; 10 Wentw. 43 to 48. Declaration for *mesne profits*; 48. *Postea* issues found, and executions; 48 to 50. Declaration in ejectment and trespass on several demises, and by different persons at different times—plea, retraxit, judgment, &c. 50 to 54. Declaration in trespass after judgment in ejectment by default for *mesne profits* in the nominal plt's. name, judgment, &c.; 54, 55, 56. 10 Wentw. Index of references to various English authors, forms p. 1 to 10; American, see below.

*Formedon*—English forms referred to; declaration in remainder by a minor; 10 Wentw. 167 to 175. Plea, a fine levied &c.; 175 to 177. Another declaration; 177 to 182. Four pleas; 182 to 188. Replications; 188 to 198. Demurrer and joinder; 198 to 200. Declaration in *descender* &c.; 200 to 202. Index of references in *formedon*; 203.

*Writ of right*—English forms in, referred to; 10 Wentw.

204 to 222. Writ of assize; 213. Wentworth furnishes the few kinds of English writs in real actions, except dower &c. Сн. 179.  
Art. 1.

*Process in real actions in Kentucky*, act December 19, 1796, is as in England in effect, except the returns are by the laws of the state. All *essoins*, views, and vouchers are taken away after one imparlance, except the tenant plead non-tenure, joint-tenancy, or several tenancy, in abatement; and then (after such plea is overruled) he puts himself on the grand assize, and the mise is joined on the mere right, and tried the next-court by sixteen jurors, summoned, tried, and sworn as in other actions; he has no excuse but non-summons. In ejectment the plt. may declare in his own name, and at once state his title &c., as in Massachusetts, deft. may plead not guilty or his title. The real proprietor may on motion be admitted as deft.; and act December 18, 1800. See judicial proceedings, Toulmin's Kentucky Laws, p. 189 to 270, many valuable provisions derived from Virginia, with some alterations and corrections.

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## CHAPTER CLXXIX.

### GENERAL PLEAS IN BAR.

#### ART. 1. *General principles.*

§ 1. Having thus considered declarations and various matters as to them; pleas in abatement, and many incidental matters; and in the last chapter, the pleas proper in each action, I now come to consider general pleas in bar; that is, matters pleadable in bar of actions, generally or specially, not confined to one or two kinds of actions, but are applicable to actions generally; as acceptance of satisfaction, acquittance by accord, &c.; or award, coverture in bar, duress, menaces, infancy, former judgment, never bailiff, receiver, executor or administrator, no effects as trustee, *non damnificatus*, *non est factum*, not guilty, *nul tiel record*, payment, *plene administravit*, release, saved harmless, usury, act of limitations &c., special matters that excuse or justify the deft. in numerous cases, and in various kinds of actions. 10 Johns. R. 49: Plea in bar is, where the plea begins in

CH. 179. abatement and concludes in bar; and if a demurrer to such  
 Art. 2. plea concludes in bar, the judgment is final.



§ 2. But it is not intended here to attend to every kind of general plea, found in the English books and in our own; nor to every matter that will excuse or justify a deft. as to the charge made against him; but only such general bars and such special matter as a pleader may have occasion to attend to with some frequency; nor will it be necessary to dwell long on the matters in this chapter, because, as will be stated as I proceed, most of them have been already sufficiently treated of, or nearly so. Under this head of *Pleadings*, or *General pleadings*, many matters are briefly considered, or merely named, in order to preserve a general connected view of a system of pleadings, of which the *synopsis placitorum* contains the mere outlines; which outlines are intended to be enlarged upon under this head of pleadings directly, as will be seen in many instances, or by reference to branches of pleadings, naturally brought into view, and considered in different parts of this work.

ART. 2. *Acceptance of something in satisfaction.*

§ 1. Whenever the plt. has a just demand against the deft. it is often in the plt.'s. power to accept something of him in satisfaction of that demand, and the deft.'s. consent to that purpose; and when this something is so delivered and accepted, and is a bar to the demand, the deft. may plead the matter in bar of it whenever it cannot so well be given in evidence; as where the plt. sues the deft. for rent or repairs &c., on account of his term for years in certain lands, the deft. may well plead *actio non*, admit the lease made to him, but also that at —, on —, he surrendered all the residue of his term to the plt., and all his estate, right, and title, and interest therein, which surrender the plt. then and there accepted; and *hoc paratus*. The plt. may reply, he did not surrender &c., and offer an issue if he can deny the surrender.

3 Inst. Cl.  
 212.—1  
 Saund. 236.

3 Ins. Cl. 214.

§ 2. So, to an action for rent, the deft. pleaded, before it became due he assigned his term to A, by indenture, who entered, and was possessed &c., and that the plt. had notice thereof, and at —, on —, accepted the said rent of the said A; *hoc paratus*. Is not of itself a waiver of notice to quit; confirms a voidable lease.

1 Cruise, 274.  
 —1 Do. 131.  
 —3 Ins. Cl.  
 217.

§ 3. So, to an action on a bond with a condition, the deft. on oyer pleaded, he procured one J. to give his bill obligatory to the plt. for the same debt, £10, which bill the plt. at —, on —, accepted in full payment and discharge of the £10, mentioned in the condition of the bond; *hoc paratus*.

Replication, J. did not deliver the said bill to the plt., and offered an issue. CH. 179.  
Art. 3.

§ 4. So, to an action on a bond, the deft. pleaded a delivery of corn, and the plt.'s. acceptance in full satisfaction; and *hoc paratus*. Plt. protesting deft. did not deliver the corn; for plea said, he the plt. did not accept the said corn of the deft. in full satisfaction of the said £6, in the condition &c. 3 Ins. Cl. 217.

§ 5. So, a bond pleaded as given and accepted in discharge of a promise, and payment accepted after the last continuance. Clift. 199,  
203.

§ 6. So, in dower the deft. pleaded, the plt. accepted an annuity: so, the deft. pleaded, the plt. accepted a promise from a third person, and discharged the deft. Replication, did not discharge: That the plt. accepted another note: Lit. Ent. 121: accepted £10, in full of all demands. Bro. R. 93. Pl. Gen. 283.  
Mod. Ent. 30.

§ 7. If the condition of a bond be to pay money, a horse or other thing may be accepted in discharge; otherwise of collateral conditions, as to deliver corn &c. A less sum may be accepted before the day, but not on it; and if a bond be to deliver a horse, money will not discharge it; for the condition in the deed cannot be altered by parol agreement. 3 Ins. Cl. 216.  
3 Ins. Cl. 216.  
—Co. Lit.  
212.

§ 8. This article acceptance is connected with accord and satisfaction in principle: so with discharge; see those heads.

§ 9. Account stated; paid by note. Form, 2 Ch. on Pl. 435. Pleased in bar of the original demand sued; usually as a sham plea to put the plt. to reply, that the note was not paid when it became due. Like plea, the plt. accepted a bill of exchange. Id. 436. 5 D & E 513,  
Kearslake &  
a.l.v. Morgan.

§ 10. The better opinion is, when a negotiable note is accepted on account of a prior debt, it is *prima facie* evidence of satisfaction. 1 Johns. R. 34; 5 D. & E. 517; 8 Johns. R. 206. 10 Johns. R.  
105, 366.

#### ART. 3. *Acquittance.*

§ 1. The deft. says *actio non*, because after making the writing, (one sued on) to wit, at —, on —, the plt. by a certain writing, the deft. produces, bearing date &c., acknowledged he had received £—, with which he confessed himself paid &c., and thereof acquitted the deft., his heirs, executors, and administrators, by the same writing; this he is ready to verify &c. Replication, *non est factum*, by one, and did not receive, by the other, as to such acquittance. Both pleaded, *precludi non*, thus—and the said B. and H. say, they ought not to be precluded from having their action &c., because the said H. says, that the writing of acquittance aforesaid is not his deed, and this he prays may be inquired of by the country, and issue joined; and the said B. says, that the said H. did not acknowledge he had received See Ch. 156.  
3 Ins. Cl. 201.

CH. 179. and had of the plt. the said £—, or any part thereof,  
 Art. 4. by that writing, as the plt. above alleges, and offered an issue.

3 Ins. Cl.  
 201, 202.

§ 2. As to parcel ~~the~~ deft. pleaded an acquittance from the plt. and as to the residue, *non informatus* and judgment. Plt. replied, acquittance for another debt. *Precludi non*, as to said £6, of which the deft. hath pleaded an acquittance; because he says, he received the £6 of the deft. in the said writing of acquittance specified, in part payment of the said £10, whereof he above acknowledged himself satisfied, and not in part payment of the £10, now demanded, as the deft. alleges; *hoc paratus &c.* Deft. rejoined, that the plt. made the writing of acquittance aforesaid to the deft. in part payment of the £10, now above demanded, as he alleged in his plea, and of this puts &c.

§ 3. More cases of acquittances pleaded, see Rastel's Entries, 179, 180.

So bar pleaded by acquittance, averring the bill could not be found, and that it is the same bill. Plt. replied, *not his deed*. Other pleas of this kind, Winch. Ent. 306; Bro. Red. 201; Placit. Gen. 5.

§ 4. See acquittances in sundry cases, Ch. 156. In modern books acquittances are considered pretty much under the head of Releases, as being much the same in principle. Still, however, considerable useful law is found in the ancient books under the head or word *acquittance*. To debt on a bond without condition, satisfaction must be pleaded by deed.

2 Wils. 86.

3 Ins. Cl. 495.

§ 5. *Further assurance*: Declaration on covenant to make it. Bar, not demanded. Deft. said, the plt. did not request him to seal, and, as his deed, deliver to the plt. the said writing of release, for further assurance of said close &c. to the plt. to be made, as he by his declaration supposes; *hoc paratus*. This hitherto has been a very rare plea in our practice. As generally, in our conveyances, at least in New England, they are usually made complete in the first instance.

Ch. 121, a. 2,  
 s. 10, a. 3, s.  
 14.—Ch. 155.  
 1 Esp. 377.

ART. 4. *Accord and satisfaction*. This is a good plea in bar in account, assumpsit, in case, debt, in replevin, trespass, trover, waste, &c.; in fact, it is a good plea, wherever damages are demandable by way of amends: Is one of the remedies by the parties, Ch. 2, a. 6; in Covenant, Ch. 121, a. 2, r. 10; a. 3, r. 3, cases; and Debt, Ch. 155, many cases; and the principles on which this plea is pleaded, and our manner of pleading this plea, as in Marquand v. Hale; and Baker v. Lovett, Ch. 35, a. 11. The substance of this plea

Marquand v.  
 Hale.  
 3 Ins. Cl. 203.

as formerly pleaded in England, may be seen in the subjoined note.\* (Form of plea, 2 Ch. on Pl. 434.)

CH. 179.  
Art. 5.

ART. 5. *Award.*

§ 1. It will not be necessary here to add much on this subject, so largely have awards and abitraments already been considered, Ch. 2, a. 6, 7, as one of the remedies parties themselves adopt. Ch. 9, a. 16; Ch. 13, as the ground of *assumpsit*. Ch. 141, as the ground of debt. Ch. 167; Ch. 170, a. 14. *Pierce v. Treadwell*.

Form as  
pleaded in  
bar, 2 Ch.  
436.

However, some matters may here be added on a subject that occupies so large a part of a system of pleadings. The manner of pleading an award as in the subjoined note.

§ 2. *Note.*—More anciently in England, in an action brought, defence &c. as to the force, &c. *non cul.* and as to the residue of the trespass aforesaid, above supposed to be done, *actio non* &c. Deft. says, that after the time in which the trespass is supposed to be done, viz. on — at — the deft. and plt. put themselves on the award, determination, and judgment of A, B, & C, as well of that trespass as of all other trespasses, suits, quarrels, debts, dues, and demands between them, the plt. and deft. before then had, moved, or done, and the arbitrators taking on themselves the burden of

3 Ins. Cl.  
225.

\* Defence in common form, *actio non* &c., because protesting he does not acknowledge any thing in the declaration to be true; for plea says, that after the promise sued was made, to wit, at —, on —, such a concord was had between the plt. and deft., by the mediation of their friends amicably interposing, as well of that promise as of all other trespasses and offences &c., between the plt. and deft. before the same (time) had, done, moved, performed, or pending, to wit, that the deft. should give to the plt. £—, in full satisfaction and discharge, as well of the promise whereof the plt. now above complains, as of all other trespasses and offences by the deft. before that time to the plt. done; and that the deft. thence against the plt., as well of that promise as of all other trespasses and offences, was forever to be discharged and acquitted; and the deft. says, that he then and there gave and delivered to the plt. £—, and the plt. then and there received and accepted the same £—, of the deft. according to the form and effect of the agreement aforesaid; and this he is ready &c.

The assign-  
ment of  
debts and  
balances of  
accounts  
cannot be  
pleaded as an  
accord and  
satisfaction  
to debt on  
a bond; 3  
Cranch, 293.

The replication was no such concord, *precludi non*, because he said no such concord was had between the plt. and deft. in the manner and form he alleged, and offered an issue. 3 Inst. Cl. 203.

This ancient way of pleading accord and satisfaction, was much the most lengthy; and was a much more unsafe way of pleading than the modern, as in that the party pleading this plea, has only to allege, and prove he gave §— in satisfaction of the demand, and that the plt. accepted that sum in satisfaction of it. By this concise way of pleading accord and satisfaction, called *concord* in some of the old books, the deft. avoids the hazard of mispleading the special manner of the agreement, and is not bound to produce evidence to support the particulars of it, but only evidence to prove the payment and acceptance in satisfaction. This short and concise way of pleading an accord, is said by some, not to be properly pleading accord and satisfaction, but pleading satisfaction; as this plea is not often pleaded, and most matters essential to it have been stated in the chapters above mentioned, it is not necessary to add here.

9 Co. 80, b.  
—Stra. 673;  
—5 Mod. 86

May be in  
evidence, 2  
Ch. on Pl. p.  
235.

**Ch. 179.** awarding in the premises, then and there awarded, determined and adjudged in the form following, to wit, that the deft. should give to the plt. 20s. in full satisfaction of the trespass, above specified; as also all other such trespasses, quarrels, debts, dues, and demands, which 20s. the deft. then and there gave to the plt. according to the form and effect of the award, determination, and judgment aforesaid; *hoc paratus &c.*

Art. 5. § 2. The plt. replied, the arbitrators made no such award, *precludi non*, because he says the arbitrators did not make any such award, order, or judgment of and upon the trespass aforesaid, as the deft. alleged and offered issue.

§ 4. These pleadings are concise, clear, and simple, and far better than the redundant pleadings on the subject in modern times. Award may be in evidence in *assumpsit*. 2 Ch. 437.

6 Ins. Cl. 17. § 5. Debt on an award. The plt. on *oyer* of the bond and condition to perform the award, pleaded no award made between the submission and the time appointed for making the award in the usual form. The deft. replied and stated an award made by the arbitrators, nearly in the above form, ready to be delivered &c. and assigned a breach by the deft., and alleging performance on the plt's. part; and this he is ready &c. Rejoinder as in his plea no award made by the arbitrators &c. &c., and offered issue.

1 W. Bl. 463,  
Soulby v.  
Hodgson.

§ 6. If arbitrators join with the umpire in the award, it is but surplusage, and the award is good and may be declared on as his umpirage; and hence it may be pleaded as his umpirage and his sole act. When the defence is the revocation of the submission, it is in evidence on *non assumpsit*. 16 Johns. R. 205, *Allen v. Watson*. In the following cases, *Needham v. Gorham*, and *Procter v. Walker*, &c. it was held a parol submission is good and binding, and may be well pleaded with an award thereon in bar.

*Needham v.*  
*Gorham*.—  
Mass. S. J.  
Court, Essex  
Nov. Term,  
1805.

This case was an award pleaded between the assured and the underwriters on their parol submission by their policy as broker. The action was *assumpsit* on the policy of insurance. The deft. pleaded *actio non* to first and second counts, and said that after making the promises therein and before sued &c. divers disputes had arisen between the assured and insurers (naming them) as to his demands on them &c. by reason of a loss the plt. alleged had come to his vessel &c., and to make a final end thereof the said G. H. F. B. and G. (insurers) by P. C. Brooks, their agent, duly authorized &c., and the plt. at — on — submitted themselves to the arbitration of — (was by parol) to award &c. of and concerning the premises and all demands he had against said G. H. F. B. and G. respectively by virtue of said policy and promises

&c. for and by reason of any loss &c., and engaged to abide by &c. So stated the referees accepted, heard, and awarded, the plt. had no demand upon and against them &c.; *hoc paratus* &c. award was in writing. Replication, no award made and issue offered. In this case there was no evidence of any submission but the testimony of one of the referees, or of the agent's authority. This referee testified the underwriters never appeared by themselves, that the plt. did not object to Brook's power or to any want of submission. This deemed good evidence of the submission and of the agent's power. But held, the agent must be authorized by deed when the principal must act by deed, but may be by parol where the principal can act by parol, as refer &c.

CH. 179.  
Art. 5.

1 Bac. Abr.  
183, 198.—  
Co. L. 46.—  
1 Com. D.  
625.—5 Co.  
51.

Held, a parol submission is valid between the master of a vessel and his owners as to wages and disbursements, and that the award is good evidence on *non assumpsit*.

Procter v.  
Walker, Nov.  
1811.

§ 7. But where there is a submission by parol to five persons, it is held, that all five must join in the award; *secus*, to do an act of a public nature; cited 1 Bos. & P. 242; see Ch. 135, a. 6, s. 26.

1 Phil. Evid.  
71.—6 Johns.  
R. 39, Green  
v. Miller.

§ 8. Where an award is to be ready to be delivered at a particular day, at a particular place, it may be pleaded that it was made elsewhere, ready to be delivered at the place. Arbitrators cannot direct the surrender of the arbitration bonds.

1 Ld. Raym.  
533, Doyley  
v. Burton.

§ 9. If an award is to be made in writing and ready to be delivered by a day named, it is sufficient to plead or shew that it was made in writing by the day, without adding it was ready to be delivered. At any rate, if to be delivered on request, no objection lies until a request is shewn.

1 Ld. Raym.  
115, Marks v.  
Marriott.

A parol submission to arbitration, and a performance of their award, is a bar to an action on simple contract.

12 Mass. R.  
134.

§ 10. If an award contains general words sufficient to take in all matters, the plt. who sues a particular matter shall not be admitted to shew any thing was not taken into consideration. This was an action against the deft. for wrongs done to the plt. in India, as the deft. was deputy governor of the East India Company. He pleaded, not guilty, and gave in evidence a release the plt. gave the Company in pursuance of an award, reciting he had sustained several injuries by the company's agent, particularly the deputy governor; therefore the referees award him (plt.) £1000, and ordered the plt. to give a general release. The deft. being no party to it could not plead it; hence the chief justice allowed him to give it in evidence in mitigation of damages. Plt. offered to call the arbitrators to prove they refused to consider the cause of this action as it was for the private personal wrong; but the

1 Stra. 646,  
Shelling v.  
Farmer.

CH. 179. award and release having general words sufficient to take in all, the court would not suffer any evidence to be given to contradict the award. Verdict 1s. damages. *Quare* as to this case, for when the submission is as usual, of *all demands*, and the referees think they have considered all, as they will when they know of none but such as they have considered, they naturally make a report general enough to contain all, yet in fact, an important demand was not laid before them, as is often the case, and of course their award does not in fact embrace it. Now what is to be done? Is it to be lost? Now according to many decisions already stated, such a demand is suable and proveable, and if not, in this case *Shelling v. Farmer* (if so the fact,) how can a demand, not known of or considered by the referees, be sued in any case when they make a general award as that they have considered all demands referred to them and awarded on them &c. The referees unknowingly omitting an important demand, think they have settled all matters; but they are mistaken and see their mistake the moment they know the truth. Now it is repugnant to first principles to hold an award, or even a verdict, any more than the settlement of an account, so covers a mere mistake that it cannot be rectified. So contended the only remedy is in setting the award aside. This is generally no remedy, because generally, at least often, the award is accepted and even executed before the omitted demand is discovered even by the party, as it may be some remote title to some real estate or some loss on a distant voyage &c. not known till long after the award is even executed. On the whole, the above is a very doubtful decision. And see *Webster v. Lee*, Ch. 160, a. 2.

6 East, 139,  
Bonner v.  
Carlton.

§ 11. A verdict in an action is taken for a certain sum, but subject to the award of an arbitrator. If he award a greater sum, his award is void, and no *assumpsit* by any implication arises even to the extent of the sum named in the verdict, as the ward was of an entire sum.

8 East, 13,  
George v.  
Lousley.

§ 12. If a time be fixed for making an award, and one is made after it is expired, it may be pleaded and shewn as a valid award, if a power was given to the arbitrators to enlarge the time, and the award is in fact made in that time, though it be not expressed the referees did enlarge the time. But the court will not grant an attachment for the non performance of the award without a verification of the fact. Whenever the costs of the cause and of the special jury are distinctly and separately submitted to the discretion of arbitrators, they must distinctly adjudicate on each, or the award will be bad, and no bar &c.; and if they direct their own expenses to be paid without authority, so far their award is bad and to be set aside.

§ 13. *Debt on bond.* On oyer of the bond and condition, Ch. 179. held, the debt. could not plead in bar to this action, partiality Art. 5. and improper conduct in the arbitrator, in making his award without hearing the debt. and his witnesses; but only cause to set the award aside. Nor can a parol agreement between the parties to abandon the award, be pleaded to such action, as the claim arises on a deed; but a cross action may lie on the agreement against the plt. for suing on the bond in breach of such agreement. The agreement was not even pleaded as accord and satisfaction, but only as an agreement to waive without any act done.

8 East, 344,  
Braddick v.  
Thompson.

§ 14. This was an action on promises. In this case, in 1797, Geaves & Co. assigned by deed, all debts due to them to the plt., and gave him a power of attorney to receive and compound for the same. Under this power the plt. in 1799, submitted to arbitration the matters in difference then subsisting between Geaves & Co. his principals and the debts., and the plt. and debts. promised to each other to perform the award. The arbitrators awarded a sum, £831 19s. 4d. due from the debts. to the plt. "as the attorney or assignee of E. P. Banfill, senior & Geaves," (his principals;) and that the debts. should pay that sum to the plt. "in full discharge of all debts and sums of money due from the debts. to E. P. Banfill, sen. & Geaves, on any account whatever." Held, 1st, he might maintain an action for it in his own name: 2. The court will not presume the matters in difference submitted, arose after said assignment and power to the plt.: 3. But such matter may be pleaded by way of defence to the action: 4. Not necessary to make a *profert* of the deed of assignment, for it was but inducement: 5. The plt's. power was to refer matters as they existed in 1797. He referred in 1799, and the debts. suggested the matters in 1797 were at an end, and new matters arose after, that is, after his power given, and so the court would intend; but the court did not so intend; and Lawrence J. said, facts were so, "it should have been pleaded by the debts.;" and cited Salk. 74. A submission of all controversies pending; award, all suits now pending between the parties cease, and debts. to pay, £10, in full of all demands, and release all demands till the time of the award. Held, release good; for no demand is to be intended to arise in the meantime; and Lawrence, J. added, "and if any new controversy had happened, which is not to be intended, he that preterds to excuse the non-performance ought by his pleading, to set it forth and shew it." "So in this case, if new differences had arisen between the date of the assignment and the time of the reference, it should have been shewn by the debts. by their plea." Held,

8 D. & E.  
571, Banfill,  
jun. v. Leigh  
& Jeffray.

CH. 179. on the debts'. special demurrer to the plt's. declaration, it  
 Art. 5. does not appear the plt. had any direct power to refer; but  
 this award seems to have been deemed good and pleadable, as the ground of action on this principle; that by the assignment, the whole equitable interest in the debts due from the debts. to the plt's. principal was assigned to, and vested in, the plt., and, having this interest, he agreed to refer the whole, and the award, the debts. owed him as the attorney and assignee of his principals, and should pay him as such, was good.

This case establishes one important rule (among others,) to wit, that if it do not appear in the award itself, that it contains matters not included in the submission, or in the power to submit, but in fact the award does contain such excess of matter, this must be pleaded by the party objecting to the award. On the same principle, the *cestui que trust*, in personal matters, with a power from his trustee, may submit for him, and promise himself to perform the award, and the arbitrators may award payment to the *cestui que trust*, and the award is valid.

2 Ch. on Pl. § 15. Though an award may be given in evidence on *non*  
 436, 476, *assumpsit*, yet it is often best to plead it, to compel the plt.  
 Dighton & al. v. Whiting in his replication, to take issue on some particular part of  
 & al.—1 the plea, and thereby to admit the residue, and thereby to  
 Saund. 324, narrow the facts in issue, and so the evidence. This is often  
 327.—2 very beneficial to both parties. Kyd on Awards, 390, 392,  
 Saund. 183.— 465. Form of the plea, no award made; 2 Ch. on Pl. 476 :  
 4 D. & E. 688. Of a plea stating the award and also stating the plt's. non-  
 —3 East, 344. performance of a condition precedent; id. 477; 2 Saund.  
 184; 1 Saund. 165.

1 Day's Ca. § 16. Pleas in bar to debt on bail bonds. Forms, 2 Ch.  
 130 —Kirby, on Pl. 478, 480. An award performed is a good plea in bar  
 364, Rust v. to an action for the matter submitted.  
 Wilson.

Action on a note. Plea, it was given to enforce obedience to an award to be made &c., and no award made. The plt. may reply and state an award, without averring performance by the plt.

Kirby, 18, § 17. Connecticut—pleas in bar there, to an action on a  
 Fitch v. Hall. bail bond. Plea, a surrender of the principal in court as  
 matter *in pais* and not of record, is bad.

2 Day's Ca. § 18. Connecticut. Case against a sheriff for an escape,  
 562, Smith v. plea, *he swore out of jail &c.*, is good, stating the process  
 Huntington. thus, "that the prisoner being a poor debtor, unable to support himself in prison, prayed out a proper citation and notification to notify the plt. to appear before A, a justice of the peace &c., or some other proper authority, at the dwelling house of the gaoler &c., to show cause &c. that such cita-

tion was served &c. and returned to B, who was then a justice &c., who attended at the time and place mentioned &c., and examined into the circumstances of the prisoner, and being of opinion that he was a proper subject of the poor prisoner's oath, administered the same to him &c., that the prisoner remained in gaol one half hour longer, and nothing having been left for his support, went at large, which was averred to be the same escape &c. Held, a good plea. Plt. may reply, that money was left &c. for the prisoner's support, if the fact be so.

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Art. 6.

§ 19. *Connecticut.* Judgment reversed &c. pleaded. As where goods were seized on execution and delivered to A, on his giving a written promise to redeliver them to the officer on a day named. On this, A was sued; he pleaded in bar, that the judgment, on which seized, was reversed, and the goods restored to the original owner. Held, a bad plea.

1 Day's Ca.  
370, Phelps  
v. Landon.

§ 20. *Connecticut.* Laches pleaded, in not suing the original debtor B, while solvent &c., as where the promisee sued A, who, in writing, in consideration the plt. withdrew his action and attachment, laid on such debtor's property, promised he, A, would pay the debt, if it could not be obtained from B. Held bad.

Kirby, 193,  
Barnard v.  
Norton.—  
Cited 10  
East, 40, note.

§ 21. *Connecticut.* To a *scire facias* to revive a judgment, matter cannot be pleaded in bar, which might have been pleaded to the original action in bar of it. Hubbard & al. v. Manning.

Kirby, 256.

§ 22. *Connecticut.* An officer is sued for nonfeasance in office, he may plead in bar, the special instructions of the plt.

Kirby, 373.

#### ART. 6. *Coverture in bar.*

§ 1. This is also a good general bar in most actions, as where a woman is married or a *feme covert*, at the time she gives her bond, note, or covenant, or makes a promise &c. In such case her act or contract is void; and if she be sued upon it, she may plead *actio non*, because she says, that at the time of making the writing aforesaid, she was covert of T. her husband, then living, and now in full life, to wit, at —; and this she is ready to verify &c. To this plea the plt. replied, that she at the time of making that writing was sole and not covert of the said T., as she alleges, and offered issue.

Forms of, 2  
Ch. on Pl.  
419 to 588.—  
5 Ins. Cl. 206,  
207, 208.—Is  
the only case  
of coverture  
in bar; 2 Ch.  
on Pl. 415.

§ 2. This plea was much more in use formerly, than it is now, as in modern times it has been settled law, that coverture may be given in evidence on the general issue, though still it may be pleaded if the party chooses, and the forms in which it has been pleaded have varied. One form was for the plt. to reply, the deft. was sole; *absque hoc*, she was cov-

3 D. & E. 631.  
—Coverture  
in all other  
cases is in  
abatement;  
id.

CH. 179. ert &c.; *hoc paratus*; and the deft. rejoined, she was covert,  
Art. 7. as in her plea.

§ 3. So to an action of debt &c. brought by a *feme covert*, as sole, the deft. may plead in bar, that A and she are married.

5 Com. D.Pl.  
2, W. 21.

*Quere*, and  
above, a. 2,  
Ch. on Pl.  
425.

§ 4. This plea, in itself, is simple and plain, but the replication to it has often led to much intricate inquiry; for though the general rule has ever been, that a *feme covert* can neither sue or be sued alone; and that she is liable to no action upon any contract during coverture, but that the contract is absolutely void; yet there always have been some exceptions to this general rule. As where the husband has been considered as dead in law, and so she entitled to dower; as if he be exiled for life, or has abjured, &c.; or, as decided in New York, if adjudged to the State prison for life: so if divorced *a vinculo*, her capacity to contract is restored to her to all intents; but the plea in replying, that she had, when she contracted, an adequate separate maintenance settled on her by her husband, and lived separate from him, has undergone the greatest variations, and produced much the most litigation; but the law on this point has been fully examined, Ch. 19, *Baron and Feme*, and in other chapters.

*Feme covert*  
cannot plead  
by attorney;  
2 Ch. on Pl.  
455.

5 D. & E.  
679. *Ellah*  
v. *Leigh*.

§ 5. In this action for use and occupation, the deft. pleaded *coverture*, averring that C. Leigh, her husband, was still living. The plt. replied, that before the promises &c. were made, to wit, July 1, 1779, the deft. and C. Leigh were parted and separated, and July 2, 1779, alimony was allowed by the ecclesiastical court pending a suit there, which was a sufficient maintenance, and that she obtained credit and made the promises on her own account, as a *feme sole*, and not on her husband's credit, and being so separate, and apart &c.; and having such alimony, she made the promises &c. To this replication the deft. demurred; and it was adjudged bad. Judgment for the deft. One objection was, that the deft. did not plead she and her husband lived separate by their agreement; another, that it was not pleaded he settled on her a separate maintenance.

#### ART. 7. *Duress*.

This is also a general bar in actions on contract, and *duress* must be pleaded and cannot be given in evidence, as stated, Ch. 91, a. 5; Ch. 121, a. 2, r. 6. If one of two promisors sign a note by duress; Ch. 42, a. 1, *Pierce's* case; and the principles of the plea considered, Ch. 158. This plea has been already, in Ch. 144 and Ch. 158, considered as largely as is consistent with the plan of this work. Form of it, 2 Ch. on Pl. 464, 466.

#### ART. 8. *Infancy*.

§ 1. This, too, is a general plea, pleadable in many actions, Form of the plea, 2 Ch. on Pl. 466, in debt

and generally in all founded on contracts, except for necessities, as all a minor's contracts are void or voidable, if not for necessities; therefore, whenever a minor under twenty-one years of age is sued on his contract, not for necessities, he may appear by his guardian &c., make defence, and plead the plt. ought not to have or maintain his action against the deft., because he says, that he, at the time of executing the writing obligatory sued on, (if a deed) was within the age of twenty-one years, to wit, of the age of — years, and no more; *hoc paratus*. Though the words under the *to wit*, are not essential, as the law views all minors alike, and without the *videlicet*, there is a sufficient averment he is under age, or is a minor, or infant.

Ch. 179.  
Art. 8.

5 Ins. Cl.  
215.

§ 2. To this plea the plt. replies, that he ought not to be precluded his action &c., because he says, the deft. at the time of executing that writing obligatory, was of full age of twenty-one years; without this, that the deft. at the time of making that writing obligatory, was within the age of twenty-one years, [to wit, of the age of — years] as he in his plea alleges &c., but to omit the words in brackets.

§ 3. On *non est factum*, infancy must be pleaded. Ch. 151, a. 9. But on *non assumpsit*, may be given in evidence or pleaded; Ch. 98; Ch. 121. And as the practice of giving infancy in evidence on *non assumpsit* has considerably prevailed, and as actions of *assumpsit* are much multiplied in modern times, and in the places of other actions, this plea has become less frequent than formerly.

\*§ 4. So to this plea of infancy, the plt. may reply that the minor, after he came of age, confirmed his promise; and the minor may rejoin he did not; and the issue is on the confirmation. What particular acts, on the minor's part, amount to a confirmation or not, is by no means well settled. It is a question of fact, to be left to the jury. The contract in infancy, and the continued duty in equity and conscience being viewed as a sufficient consideration of the promise of confirmation.

1 D. & E.  
648, Bostwick v. Car-  
ruther.

§ 5. An action lies against an infant for money lent to buy necessities with, and laid out accordingly; and to the plea of infancy, in such case, the plt. must reply, the money was so laid out; must state and shew where it was laid out.

1 L. Raym.  
314, Ellis v.  
Ellis.—Salk.  
197.

§ 6. Infancy pleaded to the acceptance of a bill of exchange, and when pleadable in abatement, is not assignable for error.

3 Salk. 197,  
Williams v.  
Harrison.

§ 7. In this case, on an information for a riot, an infant deft. was allowed to appear by attorney. This has been done several times in our practice by leave of the court.

2 L. Raym.  
1284, Queen  
v. Tanner.

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Art. 8.

1 L. Raym.  
232, Pickey  
v. Harrison.  
—4 East,  
485, Plasket  
v. Beeby & al.  
2 Johns. R.  
279, Van  
Bramer v.  
Cooper.—5  
Johns. R. 160.

5 Johns. R.  
160, Hartness  
v. Thompson  
& al.—3 Esp.  
N. P. R. 76.  
—5 Do. 47.

1 Dallas, 166,  
may by him  
after of age,  
on *nil dicit*,  
Slivir v.  
Shelback.—  
4 Dallas, 130  
Stanbury v.  
Marks.

6 Cranch,  
Vasse v.  
Smith, 226.

3 East, 62.—  
6 Bac. Abr.  
126, 132.—6  
East, 539.—  
1 Esp. R. 172.

2 Ch. on Pl.  
460, 467.

§ 8. A guardian admitted for an infant plt. to aid him in pleading, ought to be entered of record; if not, judgment will be arrested, but upon objections on the record; and if the deft. be an infant, the plt. ought to apply to name one for him; 2 Wils. 50. Only at the time of pleading can a minor pray the *parol to demur*; 4 D. & E. 75. But an *infant deviser*, sued by a special creditor of the *devisor*, cannot pray the *parol to demur* by reason of non-age.

§ 9. In an action against two defts. only one is taken. Held, the one in court cannot, on the general issue, give the *infancy* of the other in evidence; nor, as it seems, plead it. The plea of *infancy* is a *personal privilege*, of which the infant only can take advantage.

§ 10. Where several are sued on a *joint and several contract*, and one pleads *infancy*, or gives it in evidence, the jury may find a verdict for the minor, and for the plt. against the other defts.; or, as to the minor, the plt. may enter a *nolle prosequi* and take judgment against the other: *infancy* can be taken advantage of but by the infant himself.

§ 11. The appearance of an infant on a suit brought against him, is not a *judicial act*, and will be fatal in error; and a judgment against him may be reversed after full age, except in cases of real actions, and fines and recoveries, which are in their nature mere modes of conveyance, or assurance, and the fact must be tried *per pais*, and not by inspection.

*Infancy* may be given in evidence on *non-assumpsit*, and therefore in *assumpsit* a minor sustains no disadvantage if he omits to plead his *infancy*.

§ 12. *Infancy* is a plea in bar to an action by an owner of a vessel against his supercargo, for breach of instructions, but is not a good plea in an action of trover for the goods; though *infancy* may be given in evidence on the plea of *not guilty* in trover, not as a bar to the action, but to shew the nature of the act which is supposed to be a conversion. So an infant is liable in trover, and cannot plead or shew his *infancy*, though the goods were delivered to him under a *contract*, and though they were not actually converted to his use. It seems he is not charged on his contract, but only for the value of the goods, on the ground of *tort*; and a minor may be guilty of a *tort*. Nor is there any hardship in this case; for he might have restored the goods to the right owner, or if the minor be held to pay the price in trover of the goods, he thereupon has them to his own use; and therefore has a *quid pro quo*. Latch, 21; Yelv. 166; liable, though he do not get possession by *tort*.

§ 13. It seems *infancy* may be in evidence in debt on simple contract; but in an action on a deed, *infancy* must be pleaded, and by guardian. 3 Burr. 1805.

§ 14. *Judgment for want of pleas.* Judgment for want of a plea cannot be entered till the default be previously entered. CH. 179.  
Art. 9.  
Coleman, 47.

Plea sent by the mail, and afterwards for want of one the plt. entered judgment; this set aside, and plt. held to pay costs, on the deft's. attorney's swearing he believed the plea was received, and this not denied by the plt's. attorney. Coleman,  
107, 108, Cole  
& al. v. Staf-  
ford.

If the plt. notice the cause for the circuit, but neglects to bring it on, on motion for judgment, as on *nonsuit*, he will be held to stipulate, and pay costs of the circuit, depending on the court's discretion. And in a real action the tenant is demandable on the *quarto die post*; but the demandant is on the *prima die placiti*, and for non-appearance his default may be entered, which subjects him to a nonsuit if he do not appear and excuse on the *quarto die post*. Coleman,  
113, Peck v.  
Phillips.—  
Coleman,  
122, Swift v.  
Sacket.

See pleadings in cases of infancy in Ch. 35, various pleas peculiar thereto.

ART. 9. § 1. *Judgment in a former action is also a general bar*, and may be pleaded in every action; for if the plt. has had the benefit of one trial, he shall not call on the deft. to have the same matter tried again, except by way of a new trial, an appeal, or review specially provided for by law. This general plea in bar, however, has been naturally divided into two branches: bars in *personal* and bars in *real* or *land* actions have been already largely considered; Ch. 146, a. 5; Ch. 148, a. 1; Ch. 166, a. 5; Ch. 165; and especially in Land Actions, Ch. 178, a. 22; as such pleas naturally come in; but this former judgment is no bar when the points come in only *collaterally*, which are considered; or are only considered *incidentally*; or can be inferred only *argumentatively* from the judgment or decree. 6 Wheat. 109, 118, Hopkins v. Lee. Form of  
pleading it in  
bar, 2 Ch. on  
Pl. 438, 439.

§ 2. Nothing further need be said here, than merely to recognise the principles on which a *judgment in a former action* is a good plea in bar to a subsequent action for the same thing between the same parties or their privies: 1. It is a bar on the *merits* and in substance, because by the former judgment the right is reduced to a certainty in a trial of the same case, and it is clearly ascertained what the losing party is to do to the other by way of satisfaction of any wrong done to him, by either a breach of contract or by some tortious act; and this satisfaction is either made or the law provides an execution on the judgment for making and completing this satisfaction; and it is *actum agere*, and absurd to admit a second action, and so to go over the same ground a second time, and to no other purpose than is already done: 2. The *judgment in the former action* changes the nature of the case between the parties; as if the plt. have a contract against

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the deft. bond, note, or other contract, sues it and gets judgment upon it; his right that once rested on *the contract only*, is merged and gone; he no longer has any claim *on contract*, that is extinct and swallowed up in the judgment of a higher nature rendered on it; and the plt's. right of demand once resting on *contract*, now rests solely on *the judgment of record*, that only is suable in the case, even though that judgment is not satisfied: 3. The same matter between the same parties, or their privies having been once considered and tried in a proper court, and judgment rendered thereon of record; that judgment is the result of an investigation and trial of the case on the merits, whether for plt. or deft., and the party obtaining this judgment is in every case entitled to an execution to carry it into effect, as the very end and *fruit* of his first action. This is the beneficial end of the law in framing and conducting the action; then to allow a second action to be brought for the same cause of action between the same parties, or those claiming under them, would be treating the first trial as useless, and depriving the successful party in it of all the benefits of it; and further, if a second trial in such a case could be allowed, a third and a fourth might, and so, trial after trial, without end. Hence it most clearly follows, there never ought, on principle as well as a ground of convenience, to be a second trial allowed on the merits of the same matter, whether contract or tort, or point in land title, between the same parties, or those coming in under those persons who were parties in this first trial; and, as before observed, the question is not so much concerning the form of action, but is, whether the party comes in the second action, to investigate and try the same point or points that were investigated and tried in the first action. If that was of a form not to let in the merits to be tried, as in *Moses v. Macfarlan*, or ejectment founded solely on a right of *entry &c.*, where the real point between the parties was, and is, a mere right of *property*, triable only in a writ of right, then the reason for disallowing the second action wholly ceases, and the same observation holds if the first action by any means went off without a trial on the merits.

4 Johns. R.  
222, *Hutchins*  
*v. Fitch*.

§ 3. So the deft. must shew the plt. in the former action was the rightful owner of the thing; as where the plt. H., in this sued the deft. on a note to A, or *bearer*, and judgment for the deft.; and sued again by another, he pleaded in bar the *former judgment*. Held, no bar to the second action, unless the deft. proved also A was the rightful owner or possessor of the note.

6 Johns. R.

26, *Thomas v. Rumsey*. A venue is not necessary in a plea; cited 2 Bos. & P. 69.—3 Bos. & P. 158, c. 63, a. 8, s. 2.—2 Saund. 17, c. 175, a. 6, s. 3.—2 Burr. 985.

one, *this is a bar &c.*; as where B. and C., printers and publishers of the newspaper that contained a libel on the plt.; he sued B. for the libel, and he well pleaded in bar, *since the last continuance*, that his partner C. in an action brought against him by the plt. for the same publication, had satisfied a judgment the plt. had recovered against him. Held a good plea; held also, that it is no good objection to a plea of a former judgment, recovery and satisfaction, that it contains matter of *fact*, and matter of law: special jury struck, plt. being a member of Congress, is by statute.

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§ 5. So if the deft. in *trespass* (first action) make a demand, and it is submitted to the jury and decided, he is barred in a second action,—as *trover* therefor; as where A brought trespass against B for cutting trees on A's land, and making them into coal; and their value, and B's countermand for the coals, were left to the jury, who found for the plt. B then brought *trover* for the coals, against A, *remaining on his land*. Held, B was barred, as the matter of the coals, and his claim to them, had been submitted to the jury in the former suit; so a conclusive bar to the second action; had the coals been in B's possession, they might have become his property on his paying the value of them, but they were not so, and he was a trespasser.

6 Johns. R.  
168, Curtis v.  
Groat.

§ 6. So judgment in *trespass* for the same goods may be a good plea in bar to *assumpsit* for the same cause; as where the plt. brought *trespass* against the deft. for certain staves, and verdict and judgment for the deft.; the plt. then brought *assumpsit* against him for the same staves, as sold and delivered; and the deft. pleaded in bar the former action of *trespass*: bar good. In this case it is pretty clear the court must have had evidence the plt. in his *assumpsit* came to try the same merits he had tried in his action of *trespass*; otherwise it could not have been a bar,—for clear it is, the plt. might have failed in *trespass vi et armis*, for want of proving the *tort* and *force* necessary to be proved in that form of action, and still he might have had a good cause of action in *assumpsit* for goods sold and delivered to the deft.

7 Johns. R.  
20, Rice v.  
King.—1  
Phil. Ev. 254.

§ 7. But if the defendant plead a *set off* of monies not then due to him, and fail, this is no plea in bar to an action brought to recover those monies when become due.

7 Johns. R.  
22, Bull v.  
Hopkins.

§ 8. The plaintiff brought trespass *quare clausum fregit*, and for cutting and carrying away his wheat, before a justice of peace: plea, a former suit against the deft. for the wheat in bar. Plea in bar adjudged good; and the court justly observed, that the rule in this case depends not on the identity of the action, but on the proof being the same in both cases.

8 Johns. R.  
383, Johnson  
v. Smith.  
9 East 436,  
Rex v. Em-  
den.

§ 9. Held, that judgment in *assumpsit* upon a policy under

1 Cranch,  
331. Ins. Co. of Alexandria, v. Young.

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Art. 9.



8 Johns. R.  
442, M'Don-  
ald v. Rainor  
& al.

seal is a bar to subsequent action of *covenant* on the same policy. A verdict does not cure a mistake in the nature of the action. After verdict, every *assumpsit* in the declaration is to be decided as an express one.

§ 10. But if an *indorsee* sue a promisory note against the maker, and judgment for the debt. from some defect in the endorsement, this affords no plea in bar to an action brought by the *payee* against the maker; and that the debt. could not in this second action set up the endorsement as good, which in the former action he had shown, or attempted to show, was bad.

8 Johns R.  
453, Jones  
v. Scriven.

§ 11. This was *deceit* in the sale of a certain improvement, or patent right, before a justice. Plea in bar of this action: a former trial, and judgment, in an action before another justice against the plt. on a promisory note given for the purchase money, in which former action the present plt. set off the *deceit* in the sale, as a defence against the note; and the same was considered by the justice, and judgment for the plt. for the amount of the note. Held, that the first trial and judgment were a complete bar to this second action for the *deceit*. The very same point, *deceit*, came up in both actions.

8 Johns. R.  
390, Dean v.  
Allen.—  
1 Johns. R.  
503—2 Johns.  
R. 219, 230.

§ 12. But in an action of *deceit* before a justice, a plea of a former action by the debt. against the plt. on a *contract* in which the present plt. neglected to set-off his demand, is no bar. Enough the matter has not been in trial.

§ 13. The further this subject is pursued the clearer it will appear, that the validity of the plea of a former judgment does not, materially, depend on the sameness of the two actions; but almost solely, on the principle that the very point or points were considered, tried, and settled, the party comes to have considered, tried, and settled, in the subsequent action.

7 Cranch,  
565, Young,  
& al. v. Black.

§ 14. On *non assumpsit* pleaded, debt. may give in evidence the record of a *former judgment* between the same parties, and for the same cause of action, though it be proved by *parol* evidence to be the same cause. And though the first action be for *breach of orders*, and the second on a *promise to account*, &c. as where A, B, and C, owned a vessel and cargo, and made D their master, and consigned the cargo to him; he sold it, and neglected to settle. They first sued him *for breach of orders*, and judgment for him. They then sued him in *assumpsit* to recover the proceeds of the sales of the cargo. Plea as above, and he was permitted to prove by *parol* testimony, the two actions were for the same cause: First a bar to the second; 2d, debt. could not off-set, though become interested in C's part; 3d, not compellable to join in demurer to evidence.

§ 15. Though often best to plead a former judgment in bar, yet it may be given in evidence on *non assumpsit*, often pleaded for delay, &c. 2 Stra. 733,—1 Saund. 67, n. 1, 92 n. 3.

§ 16. Judgment in an action of trespass, on a plea of title, is no bar to an action brought to recover the land.

§ 17. *Confiscation* and payments in pursuance thereof, pleaded in bar, &c. as where A was convicted of treason in Vermont, and his estate confiscated, and the state appointed an agent to collect the debts due to it, for the state's use, the debtor paid the debt to him; and was sued by the executor of the traitor and creditor. Held, such confiscation, &c. was a bar to the action, though the original note was given in Connecticut. Such confiscation, &c. was in effect like a judgment and was specially pleaded.

§ 20. A former action on a void replevin bond is no bar to case for taking the goods out of the laws's custody, which the plt. had attached, whereby his lien was destroyed and his recovery defeated. Said 2 Phil. Ev. 125 goods in legal custody cannot be replevied.

§ 21. *Judgments set aside or not.* A cause is set down on the day calendar and called, and no appearance of the deft. nor of his counsel, being in court, the plt. takes an inquest. This will not be set aside, though merits are sworn to.

A judgment is signed for the whole penalty of a bond not due, but forfeited for non payment of interest, execution will be stayed on bringing into court interest and costs, the judgment standing as security.

Any inquest taken at the circuit is at the plt's. risk, and will be set aside with costs on affidavit of merits.

If the deft's. attorney, from sudden indisposition, is unable to attend the execution of a writ of inquiry, the court, on terms, will set the inquisition aside, especially, if the damages be excessive.

ART. 10. *Never bailiff, receiver, executor, or administrator.*

§ 1. These are general pleas in certain actions in bar; for if the deft. be sued in an action on the ground he has been the one or the other, when, in fact, he never has been such, he may well plead in bar of the action, and say, he had never been bailiff, &c. as the plt. in his action alleges he has been.

§ 2. The usual plea in either case is *actio non*, &c. because the deft. says he never was *bailiff* to the plt. of the tenements aforesaid, with the appurtenances, or of any parcel thereof, to render an account thereof to the plt. when he should be thereto required, as the plt. alleges, &c. and of *this puts*, &c. never executor *actio non*, because the said D says that he

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Art. 10.

2 Ch. on Pl.  
438, Burrows  
v. Jemino.

Kirby, 395,  
Comes v.  
Prior.—  
1 Day's Cas.  
4, Kellogg,  
& al. v. Bald-  
win.

1 Day's Cas.  
13, Magill v.  
Clay.

1 Caines R.  
111, Post v.  
Wright, & al.

1 Caines R.  
517, Bowne  
v. Hallet.

2 Caines R.  
30.

2 Caines R.  
381, Coy v.  
Clough.

See accounts,  
Ch. 8.

Mod. Ent.  
51.

6 Ind. Cl. 406,  
407.

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Art. 11.



5 Ins. Cl. 140.  
4 Bac. 58.

2 Ch. on Pl.  
450.

5 Ins. Cl. 137.

2 Ch. on Pl.  
450.

never was executor of the last will and testament of the said J, lately deceased, nor ever administered any goods or chattels of the said J, as executor of the said J, *hoc paratus &c.* It is sufficient for the plt. to reply to the plea, and say *precludi non*, because he alleges the deft. did administer divers goods and chattels which were of the said J's, at the time of his death, after the death of the said J, as executor of his last will and testament; and this he prays, &c. Or the same matter may be pleaded in abatement.

§ 3. *Never administrator*, ought, in this state, it is conceived, to be pleaded thus,—*actio non*; because he says that administration of the goods and chattels, rights and credits, and estate, which were the aforesaid J's at the time of his death, was never granted to the said D, (the deft.) *hoc paratus*. To this the plt. may reply *precludi non*, because he says that administration of all the goods, chattels, rights, credits, and estate, which were of the said J's, at the time of his death, was by — at — granted to the deft. and this he prays &c.

§ 4. *Plea never executor, or never administrator*, leaves the pleadings open for the plt. to reply and plead, and shew how executor or administrator: may be pleaded with the general issue.

But the plea never bailiff, offers an issue. So does the plea never receiver. In each of the three cases, the plt. directly charges the deft. as bailiff or receiver, and directly affirms he is such; and as such became liable. The deft. therefore may meet the charge with a direct denial, and tender issue. And as the deft. is charged with receiving the plt's monies by the hands of persons named; it is enough for the deft. to deny the action, and say he never was receiver of the monies of the plt. by the hands of those persons, naming them, to account for the same to the plt. on demand as the plt. alleges, &c.

5 Ins. Cl. 163.  
2 Ins. Cl. 103.  
73, 76, 113,  
117  
3 Inst. Cl. 230.

§ 5. As to the other pleas, as *nil debet. nil dicit, non sum informatus, non assumpsit, non assumpsit infra sex annos, non detinet, non demisit, &c &c.* See the former heads, also the index, also, no effects as trustee. See Trustee.

ART. 11. *Non damnificatus* and *saved harmless*. This plea, *non damnificatus* or *saved harmless*, is, also, a general bar in several kinds of actions in which the plt. may complain he has been damaged or injured by some *nonfeasances*, or by some act done by the deft.—See c. 120, a. 2, r. 22; c. 121, a. 4. *Non damnificatus* is the proper plea, where the deft. is to save harmless, generally. This plea, as also, the plea *saved harmless*, is sufficiently stated in the preceding chapters, especially c. 169. The deft. pleads that the plt. never was damaged—

2 Ins. Cl. 88  
Rae. Ent. 12.

*hoc paratus*, &c. and sometimes that he saved the plt. harmless, and shews how.

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ART. 12. *Plea non est factum.*

This is a general bar in several kinds of actions, as in all actions founded on deeds. This plea has been partly considered under the head of Covenant, and c. 162, a 2, in debt. See c. 91, a. 5, evidence on *non est factum*, c. 121, a. 2, in covenant, c. 144, a. 4, *Collins v. Blantern*. Bail bond *Tuckerinan v. Trask*, c. 150, a. 9, and occasionally in many other chapters and articles.

ART. 13. *Not guilty and nul tiel record.*

§ 1. The ancient way of pleading not guilty in some books was not guilty of the premises laid to his charge in manner &c. Not guilty of the trespass and assault aforesaid, in manner &c. Not guilty of the trespass aforesaid in manner &c. The modern way, *not guilty in manner and form as the plt. declares* &c., is the most comprehensive and the best form. This plea of not guilty has and will come into view in most cases of torts.

§ 2. *Nul tiel record.* This is a general bar in many kinds of actions. The deft. pleads *actio non*, because he says there is not any such record of the recovery of damages against the said D. as the plt. in his declaration supposes, *hoc paratus*. Plt. may reply *precludi non*, because he says there is such a record of the recovery of the said damages and costs, against the said D, in the same court remaining, as the plt. above hath declared, and this he prays may be enquired of by the record. See c. 156, a. 6.—Sundry cases, c. 163.

4 Ina. Cl. 246.  
1 Esp. 270.  
2 Salk. 566.

2 Wils. 113.  
3 Bl. Com.  
331.

§ 3. This is no plea to an action on a foreign judgment, and may be rejected as *nugatory*, though the plt. has called the judgment a record in his declaration and concluded *prout patet per recordum*.

1 Dougl. 1, 6,  
Walker v.  
Trotter.

§ 4. If the deft. will take advantage of a *misrecital*, he must not demur, but plead *nul tiel record*. No proceeding is a matter of record till enrolled. 9 Johns. R. 287.

3 Salk. 330,  
Pratt v. Hill.

ART. 14. *Payment of performance.*

§ 1. Is a general bar in many actions; for whenever the deft. has paid or performed what he engaged to do, no action lies, as no action can ever lie to enforce payment or performance of what is already done; payment may be pleaded or given in evidence when it discharges the contract; special performance must usually be pleaded, as the party pleading performance of a condition &c. other than a mere payment, must shew how he has performed.

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Cl. Inst. 119.  
4 Inst. Cl.  
364, 368—2  
Ch. on Pl.  
473, form.

2 Cl. Inst. 76.  
—2 Ch. on  
Pl. 474, from  
s. 3 to s. 13,  
both includ-  
ed.

Lilly's Entr.  
173, 481.—  
Bohun, 357.  
—4 Inst. Cl.  
717.—3 Salk.  
118.

Cl. Ins. 118.  
119,—to debt  
on a bond  
conditioned  
to pay mo-  
ney on a day  
named; plea  
of payment  
after the day  
must shew it  
to be the  
whole sum;  
4 Cranch,  
333.

§ 2. If the deft. has paid the debt sued for according to contract, he may plead in bar that the plt. ought not to have his action; because the deft. says, he on — day of —, in the condition above specified, paid to the plt. the said £20 in the same condition mentioned, which ought to have been paid to him the same day according to the form and effect of the same condition, to wit, at — *hoc paratus*, &c.; to this plea the plt. may reply, (if so be the fact) that the deft. did not pay on that day the said £20 to the plt. in the condition specified, according to the force and effect thereof, as the deft. alleges; and issue.

§ 3. *Payment in assumpsit, actio non*; because he says, that after the promise and assumpsit aforesaid, in the form aforesaid made, and before suing out the plt's said writ, to wit, on —, at —, he well and faithfully paid to the plt. the said £10 according to the promise aforesaid—*hoc paratus* &c.; replication,—hath not paid to the plt. the said £10 in manner &c. and issue; 3 Salk. 210, it is stated, that in covenant, breach, non-payment of rent; the plea of payment must conclude to the country.

§ 4. *Payment after the day on 4 and 5 Ann*—on *oyer actio non*; because the deft. says, that after the said — day of —, in the said condition mentioned, and before the suing out of the plt's writ aforesaid, to wit, at —, on —, he paid £15, being the principal sum due to the plt. by the said condition, with the whole of the interest for the said £15 then due—*hoc paratus* &c. after the last continuance; 7 Johns. R. 339, action, *Endorsee v. Endorser*.

§ 5. *Condition performed by appearance, &c.*—on *oyer* of the writing obligatory and condition,—*actio non*; because the deft. says, that after making that writing, and before the day of suing out this writ, to wit, on — (day of appearance at court) the said D. appeared before —, to answer to the plt. in the plea of —, aforesaid, according to the form and effect of the condition of the said writing obligatory; and this he is ready to verify by the record of the bail in the court of —, at —, aforesaid, remaining, wherefore he prays judgment *si actio* &c.

§ 6. *Replication no such record—precludi non*; because he says, there is no such record of the appearance of the said D. before —, at —, aforesaid, on the — day of —, remaining in the same court of —, at —, aforesaid, as the deft. above hath alleged; and this he is ready to verify &c.

§ 7. *Rejoinder there is such a record*,—and the deft. says, *there is such a record of his appearance* before —, at —, on —, remaining in the said court of —, before —, at —, aforesaid, as he hath above alleged, and this he is ready to verify by that record.

§ 8. The plea of payment is in itself a very simple and plain sort of a plea; and the only difficulty usually attending this plea is the doubt, what is or is not payment of the debt; as if a bill or note be payment of a preceding debt &c. or if payment to the creditor's attorney or agent be good &c. See these matters considered Ch. 165, and there more as to the manner of pleading payment; and in other parts of this work pleas of payment have often occurred.

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§ 9. If the deft. as he may plead payment of all and singular the sums in the condition; as if he plead *actio non*; because, he says, that he paid the plt. *all and singular the sums* of money in the condition specified at the feasts in the same condition limited, according to the force and effect of the same condition, to wit, at —, *hoc paratus* &c.; the plt. must be careful not to have his replication double. Hence he must protest as to all the payments, and take issue on one only, thus—*precludi non*; because, protesting that the deft. did not pay to the plt. any sum of money in the said condition specified, in any feast in the same condition limited, as he alleges; *for plea*, says the deft. did not pay to the plt. 20s. at the aforesaid feast of —, which he ought to have paid on that feast, according to the form and effect of the said condition, as the deft. hath alleged—*hoc paratus* &c.

4 Ins. Cl. 368.

*The deft. rejoins*, and says he paid the plt. the said 20s. in the said feast of —, which to the plt. he ought to have paid in the same feast, according to the form and effect of the said condition, as he above hath alleged, and of this puts &c.

§ 10. So in the same action there may be several pleas, part paid by a surety &c. and several replications there.

4 Ins. Cl. 378.  
—Rol. Ent.  
221.

*Debt on bonds—plea payment by a surety; on oyer, actio non*; because as to £40 aforesaid, parcel of said £86, which the plt. by virtue of his first writing aforesaid, above demands against the deft. he says, *the said W.* named in the said condition, paid to the plt. £40 on the — day of —, specified in the said condition, which the said W. at or on the same day ought to have paid to him according to the form and effect of the said condition of the same first writing, to wit, at —, *hoc paratus*,—and as to the said £46, residue of the said £86 which the plt. demands by virtue of the second writing, aforesaid, against the deft. he says, that *the said W.* &c. as above.

*Replication precludi non*; because the plt. says, that the said W. did not pay to the plt. the said £40 on —, which he ought to have paid to him, at, or on that day, according to the form and effect of the said first writing, as the deft. has alleged, *hoc petit*, &c. and issue joined; and as to the said £46, residue of the said £86, above demanded by the said second writing, the plt. says, *precludi non*; because, he says,

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 Art. 14. joined.

§ 11. *So the deft. may plead the day of payment is not come,* &c. thus *actio non* ; because, he says, he at —, paid the plt. £7, parcel of the said £31, in the condition of the said writing obligatory, above specified, in and upon the said 30th day of July, 1686, aforesaid ; at and upon the 30th day of July, 1687, he paid to the plt. £6 more thereof, according to the form and effect of the said condition. And as to the residue of the said sum of £31 in the said condition specified, the deft. says the plt. sued out his said writ before any part of the said residue of £31 become due, and this he is ready to verify,—*replication, precludi non* ; because the plt. says the deft. did not pay said £6 on the 30th of July, 1687, in the condition, &c.

4 Ins. Cl. 379. § 12. *Another plea in bar, the deft. delivered wheat and paid 20s.* thus *oyer, actio non* ; because the deft. says on —, he delivered the plt. four quarters of wheat and paid him 20s., which four quarters of wheat and 20s. to him on —, he ought to have delivered and paid according to the form and effect of the said condition, to wit, at — *hoc paratus*, &c.—*Replication* protesting the deft. did not pay the 20s. on —, as he has alleged ; *for plea*, says the deft. did not deliver to the plt. said four quarters of wheat on — ; he ought to have delivered according &c. and issue.

4 Ins. Cl. 392. § 13. *Another plea, wheat delivered and £4 paid & accepted in satisfaction* ; as in debt on two bonds, pleads pay of £4 in part of the first bond at the day ; as to the other, delivered wheat, and accepted ; and the said D. comes, and defends, &c. and has *oyer*, and says *actio non* ; because, as to said £8, part of said £20, the plt. demands by virtue of said first writing, that he paid the plt. £4 on the 20th of September, between the hours of one and four post meridiem of that day, which to him on that day, between said hours, he ought to have paid according to the form and effect of the said condition, to wit, at — ; and as to the said £12, residue of the said £20, which the plt. demands by virtue of said second writing, the deft. says, that he, after making that writing, and before said feast of —, in said condition, specified, to wit, 20th day of December, at —, delivered to the plt. two quarters and a half of wheat, two and a half quarters of barley &c. in satisfaction of £6 at said feast of —, to be paid, which two quarters and a half of wheat &c. the plt. then, and there, received in satisfaction of said £6, of the deft.—*hoc paratus* : plt. replied, that the deft. did not pay said £4 to the plt. meeting the words of the plea, and issue ; and as to the £12, residue of the £20, protesting he did not deliver

to the plt. said two quarters &c.; for plea, said the plt. did not accept or receive said two quarters &c. of the deft. in full satisfaction of said £6, in the said feast of —, to be paid as the deft. has alleged, and issue joined. This pleading to, and joining distinct issues, grows out the matter in bar.

§ 14. If the deft. pleads performance of covenants, he must plead in the terms thereof; and in this case performance of a covenant pleaded, otherwise than in the terms of the covenant itself, is bad, even on general demurrer; but the court thought the omission in the averment of performance was matter of substance. So that the rule in this case is in conformity to the general rule, that is, the performance pleaded must be, in *sense and substance*, according to the covenant itself.

§ 15. *General performance, how pleaded.* To debt on bond conditioned to perform articles in an agreement referred to; to plead performance generally is bad on special demurrer; as it did not appear but that some of the articles might be *negative or disjunctive*. *Quære*, if an allegation, none were so, would aid.

§ 16. So to debt on bond, conditioned to perform covenant, general performance was pleaded. The plt. in his replication, stated the indenture *verbatim*, and then demurred, shewing for cause the deft. had not shewn how he had performed the *negative* covenant: demurrer held good,—*aliter*, if the indenture, stated in the replication, had contained no negative or disjunctive covenant, in which case the defect of the plea is not setting out the indenture, would have been cured.

§ 17. Debt on bond for the payment of \$500,—plea payment; evidence may be received of the payment of a smaller sum, with the plt's. acknowledgement it was in full of all demands; from such evidence not contradicted, the jury ought to infer payment of the whole; (no error to refuse a new trial). 13 Johns. R. 353.

§ 18. Debt on a bond conditioned to pay money on a certain day: payment on a subsequent day is not a good plea without averring it to be the whole sum then due; the bond was to secure the performance of a special contract.

§ 19. If the debtor pays a debt, not knowing an action is commenced or costs incurred, this payment is no defence at the trial; the plt. must have costs.

§ 20. Held in this case, that under a plea of payment, mistake or want of consideration may be given in evidence; how does a mistake or want of consideration prove the plea of payment? By statute in Pennsylvania this plea is the general issue.

§ 21. Debt on a bond, plea of payment, and issue thereon: the jury ought to presume every thing to have been paid

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1 Bos & P.  
458, Scudamore & al.  
v. Stratton & al.

4 East, 340,  
Kerry v. Baxter; Plomer v. Rain,—receipt of payment for the value of goods does not discharge a tort as to them; 9 Johns R. 381, Jenner v. Joliffe.

5 Cranch, 11,  
Henderson v. Moore; cited 1 Phil. Evid. 161.—2 Do. 94.

4 Cranch, 333, United States v. Gurney.

7 East, 536,  
Tome v. Powell.

1 Dallas, 17,  
257, 260.

1 Dallas, 257.

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9 Johns. R.  
333, Deder-  
ich v. Lemm  
& al. 5 Johns.  
R. 341.

Form of the  
plea, 7 Went.  
460, 471, 473.  
—Doug. 452.  
—Cl. Ins. 116.  
—2 W. Bl.  
1275.—1  
Saund. 336 b.  
—Rast. Ent.  
323.—3  
Went. 211.

No plea of  
*plene admin-  
istravit*, in  
Connecticut ;  
Kirby, 246,  
483.

which *ex æquo et bono*, ought to be paid. The consideration was examined into.

§ 22. Performance on an administration bond pleaded generally ; See Dawes v. Gooch.

§ 23. Debt on bond conditioned to pay, Ch. 77 ; plea that the deft. paid the plt. £3 9s. 10d. which he " accepted, and received in full payment of the sum mentioned in the condition of the bond, and in full of all demands whatever," is bad.

#### ART. 15. *Fully administered.*

§ 1. This also, where pleadable, is a general bar in several kinds of actions ; and if the deft. is sued as administrator &c., he may plead *actio non*, and say, that at the time of suing out the plt's. writ, he had fully administered all and singular the goods and chattels which were the said J's. at the time of his death, in his hands to be administered, by which the deft. could not pay to the plt. his said debt ; *hoc paratus*. To such a plea the plt. may reply, *precludi non* &c. ; and say, the deft. at the time of suing out the plt's. writ, to wit, on —, at —, had divers goods and chattels, which were the said J's. at the time of his death, in his hands, to be administered, to the value of —, whereby he could have satisfied the plt. his debt aforesaid, to wit, — ; and this he prays &c. Form of the English plea of *plene administravit*. 2 Ch. on Pl. 451.

§ 2. This plea, it is conceived, is not pleadable in Massachusetts, or in any State in which the law makes provision for rendering the estate of the deceased testator, or intestate, insolvent, because then it becomes the duty of the executor or administrator to represent the estate insolvent, that according to the true intent of such a just provision, all the creditors not specially secured may share alike, and receive their respective dividends of the estate in proportions to their debts ; there is, therefore, where such insolvent laws exist, no occasion for this plea, because the executor or administrator may, and ought to, represent the estate insolvent, whenever he cannot pay all the deceased's debts, and relieve himself in this way ; and if estate enough to pay all, then no pretence exists for this plea. Further to allow this plea would be to allow the executor or administrator to evade the insolvent laws ; as he would be able to pay away all the estate to some favoured creditors, and when sued by others be able to plead this plea, and say, he could not pay, as he had administered fully all the estate of the deceased that come to his hands ; and the practice, as far as recollected, has been accordingly, as it is not recollected this plea has ever been pleaded in Massachusetts, or in any State

having such insolvent laws. But instead of this general plea of *plene administravit*, the executor or administrator of an estate not sufficient to pay all the deceased's debt, ought to plead a special plea, and state the proceedings under the insolvent laws, in order that he may justify a partial payment according to the provisions of them. In Virginia &c. this plea is pleadable; and if the jury find assets to a certain amount less than the plt's. claims, he has judgment to the amount found, only, and execution forthwith; and for the balance, when assets shall come into the deft's. hands. *Nimmo, ex. v. Commonwealth*, 1 Hen. & M. 470: Was an appeal from the General Court, which had given judgment for the creditor's whole debt, reversed.

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§ 3. Plea of retainer by administrators &c. Form of, 2 Ch. on Pl. 452, 455. Debt on bond; stated and pleaded with a proferet: Also on simple contract.

1 Saund. 333,  
Bond v.  
Green.

ART. 16. *A release.*

§ 1. This too, is a general bar in most actions. The form of pleading this plea is nearly the same as that of an acquittance. Art. 3, this chapter; and 2 Ch. on Pl. 439.

§ 2. The deft. pleads a release in covenant, in bar, thus, 3 Ins. Cl. 464, *actio non*; and says, that the plt. after making the said indenture, to wit, on —, at —, by his certain writing of release, which the deft., with the seal of the plt. sealed, he in court produces, the date whereof is the same day and year, released to the deft. all actions; the tenor of which writing of release follows in these words, "*know*" &c.; and this he is ready to verify &c.

§ 3. This plea has been already largely considered in Ch. 167, and occasionally in some others. There will be added here only a few cases come to hand since those chapters were written. It has been already stated, that a release will operate only on an *existing* right; hence, growing rent is not released by a release of all demands.

1 Ld. Ray. 65,  
Drage v.  
Netter.—2  
Salk. 578,  
Stevens v.  
Snow.

Nor will a general release discharge a thing, the releasor has in *auter droit*, if he has any demand in his own right, for the release to operate upon at the time it is made. Cases of releases in Massachusetts not in Ch. 167; *Hamlet v. Francis*; *Porter v. Perkins*; *Southwork v. Packard*; *Pray v. Pierce*.

§ 4. If one of several partners executed a release under his hand and seal, to a debtor of the co-partnership, of all demands, it is binding thereon. Nor can any parol evidence be admitted to show that a particular debt was not intended to be released.

3 Johns. R.  
681, Pierson  
& al. v. Hook-  
er.—6 Co. 25.  
Watson, 137,  
141.

§ 5. A & B jointly owned a hogshead of rum; the sheriff,

3 Johns. R.  
175, Wilson & al. v. Reed.

CH. 179. by virtue of an execution against B, seized the rum and sold it to C. A brought trover against C, for his share. A release from A to the sheriff of all actions, was pleaded. Held, no bar to the action against C; and that the sheriff was not a trespasser. And if one tenant in common of a chattel, sell it, trover lies against him by the other.

7 Johns. R.  
207, 211,  
Rowley v.  
Stoddard.—5  
Johns. R. 37—  
8 D. & E. 171.

§ 6. If two be jointly and severally bound, a release to one is to both; but a covenant with one of the obligors, not to sue him, does not discharge the other obligor. So are all the English authorities. But then a release to one to discharge both, must be a technical release, *under seal*.

§ 7. But a receipt in full, given to one of two joint and several debtors, on his paying half of the debt, is no release of the other debtor.

4 Dallas, 449.  
—4 Dallas,  
275.

§ 8. A special power of attorney was given to institute a suit, and afterwards one having a general power executed a release to the debt. in the action. Held, the power was sufficient, and discharged the party.

8 Johns. R.  
64. Phelps,  
adm. v.  
Johnson.—1  
Lev. 235.—1  
Anstr. 111.

§ 9. A and B gave a sealed note to C, and A afterwards gave a bond and mortgage to C, for the amount due on the note, and C covenanted to procure and cancel the note. Held, that though the bond and mortgage were not an extinguishment of the note; yet the covenant made with A was for the benefit of A and B, and a covenant not to sue, amounted to a release of the note, being perpetual, and might be pleaded as a release.

§ 10. In 2 Ch. on Pl. 439, it is said a release may be given in evidence on the general issue. Cites *Livan v. Montague*; and *Miller v. Aris*, Esp. R. 234. But often best to plead it, to narrow the evidence on the trial.

1 Lev. 235.—  
8 Johns. R. 58.

§ 11. If two be bound under seal to A, and he covenant with one of them to cancel the obligation, this covenant enures to the benefit of both, and he to whom not made, has an equitable interest in it, and therefore is entitled to use the name of the other.

4 Dallas, 275,  
McFadden v.  
Parker & al.

§ 12. Action against A and B, the endorsers of a note, another action against C, the maker, at the same time. Plea of payment by A and B, with leave to give the special matter in evidence. Proved C was arrested in execution, and he gave a bond and warrant of attorney to confess judgment to the plt., intended a lien on land, that proved of no value, when offered for sale on a *venditione exponas*. The plt. had discharged C from his arrest &c. Held, this release to C, the maker of the note, discharged the endorsers; operated as payment. A clear case.

§ 12. *View by the jury*. See Ch. 178, a. 13, s. 12. In 237, *Gravesend v. Vooshir & al.*—*Coleman*, 49.—1 Johns. Ca. 335.

1 Johns. Ca.

writs of right, tenants are entitled to a view of the premises demanded, as a matter of right, in all cases, except those restrained by statute. But in other cases is not grantable, unless the affidavit on which the motion is founded, states that boundaries are in question. When the view is granted on a writ of right on the deft's. motion, the demandant must sue out the writ; and if the plt. do not sue it out in season, court will grant a rule for him to sue out, and cause view to be given by the first day of the next term, or be nonsuited. A view causing a delay in the proceedings, is to be granted only when necessary.

The demandant in a writ of right is entitled to a view, as a matter of course. This position has some exceptions. Nor does the granting of the view depend so much on the form or kind of action, as on the difficulty of understanding the property in question, without seeing it.

ART. 17. *Saved harmless.*

§ 1. See *Non Damnificatus* and *Saved Harmless*, Ch. 179, a. 11; Ch. 116, a. 4, s. 5; Ch. 121, a. 3, r. 7, a. 4; and Ch. 169; Ch. 167, a. 7, where this plea, a general bar in several kinds of actions, has been as largely considered as is consistent with the plan of this work.

§ 2. Set-off pleaded, and general issue and set-off, with notice. Forms, 2 Ch. on Pl. 440, 441; see Set-off, Ch. 168; 2 Ch. on Pl. forms of; see Bul. N. P. 179; 6 D. & E. 460; 3 D. & E. 65; 5 Do. 133.

§ 3. When the condition of the bond is merely to indemnify, *non damnificatus* is a good plea; but when to perform something, is not; but the deft. must shew specially, how he has performed. 1 Bos. & P. 638, 640; Ch. 169. And if not performed, deft. must plead carefully in excusing his non-performance. 2 Saund. 83, *Richards v. Hodges*; and Ch. 169, a. 4, s. 5.

ART. 18. *Usury.*

§ 1. This is also a general bar in several kinds of actions, and has been largely considered in regard to the principles of usury, Ch. 153; Ch. 90, a. 11; Ch. 9, a. 10, a. 17; Ch. 169, a. 2, &c.

§ 2. B gives a note to A, as collateral security for money lent to C, and more than legal interest is taken on this note, such money is well described in pleading, to be forbearance of money lent by A to B.

§ 3. Sundry pleas of usury. See cases, Ch. 153. This was debt on a bond. The deft. pleaded usury, alleged to be in including in the bond, \$183,72, for forbearance of payment. It appeared the plt. was to deliver to the deft. a horse of the value of \$100, which made part of the \$183,72.

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Art. 18.

Coleman, 98,  
Loder v.  
Scofield & al.

Willes, 344,  
Davis v. Lees,  
—1 Johns.  
Ca. 335.

3 D. & E.  
374, 440, 448.

1 Saund. 116,  
n. 1.—1 Bos.  
& P. 640.

Form of the  
plea, 2 Ch.  
on Pl. 467.

3 Bos. & P.  
343, *Manners  
qui tam v.  
Postan.*

8 Johns. R.  
Smith v.  
Brush, 84, 86.  
—10 East,  
268.

CH. 179. Held, the evidence of usury, at the trial, varied from what  
 Art. 18. was stated in the pleadings; and that any variance in the sum alleged to be usurious, or in the consideration, stated to be given for the forbearance, was fatal to the plea; and that such evidence ought to be rejected. Whether usury or not, is a question of fact for the jury to decide.

7 Johns. R. § 4. Debt on bond, dated October 20, 1808. The deft. 196, 198, Roe or Rose v. pleaded, it was corruptly agreed between him and the plt., (condition to pay \$1087,) that the plt. should lend the Dickson.— deft. \$687, to be repaid November 1, 1811, and the plt. The court should forbear to that time, and for such forbearance of said cited, 3 D. & E. 538.—1 \$687, the deft. should purchase of the plt. sixteen shares of Esp. R. 11.— turnpike stock to be delivered &c., for \$400, when in fact Ambler, 371. these shares were worth only \$250; and that in pursuance of that agreement the deft. did purchase the shares &c. and executed the bond, as well for the \$687 lent, as for the \$400 to be paid for the shares, and for the forbearance of the \$687 &c. On demurrer to this plea the bond was adjudged to be usurious and void. The sale of the shares was merely colourable.

7 Johns. R. § 5. To a plea of the statute of usury, the plt. may re- 283, 285, ply directly, *that it was not corruptly agreed*, in manner and Waterman v. form &c., without a traverse, and conclude to the country. Haskin.

8 Johns. R. § 6. In an action *qui tam* &c., brought by a common in- 218.—7 Do. former, on the second section of the statute to prevent usury, 402, Morrill the declaration must state the usury, and that the party v. Fuller.— aggrieved neglected to sue within one year, in order to give Sess. 10, c. 12. the plt. a right of action.

1 Dallas, 216, § 7. Proof of a note given by one of two partners, for the 217, Mus- payment of money borrowed on usurious interest, and after- grove qui wards paid, will not support a count stating the usurious con- tam v. Gibbs. tract to have been made with the partners jointly. When partial payment is made and received on account of a note given for the payment of money borrowed at usurious interest, the usury is complete. And though no money is actually paid, the usury is complete, when new notes are taken in satisfaction of old ones, given for the payment of money at an usurious interest. But see English cases, Ch. 153.

3 Johns. Ca. § 8. *Assumpsit* on a promissory note. Plea, usury. The 206, Wilkie jury found two verdicts for the plt. against the opinion of the v. Roosevelt. judge. A third trial granted; and held, if a promissory note be given for a usurious contract, it is absolutely void; even in the hands of an innocent person, who takes it in a fair and regular course of trade, without knowledge of the usury. The decisions on this point, founded on the express words of the English and our statutes to prevent usury, are all one way; and the innocent holder must look to his indorsers.

§ 9. *Accommodation note.* A, made a note payable to B; he indorsed it merely to accommodate A. A passed it to C, to raise money on it in the market. C discounted it at three and a quarter per cent. a month, and after deducting the discount, applied the proceeds to pay money lent by C to A. Afterwards, in the course of his business, C passed the note to D; D sued B, the first indorser. Held, this note though indorsed by B, for A's accommodation, passed immediately from A to C, and that the transaction in its inception was usurious, and the note void. The intention was to enable A to borrow money, not of B, but of a purchaser in the market, and C was the purchaser. Hence, usury was pleadable, as it would have been if B had not interposed his name, but the note had been made to C, as it respected the usury; though had the note been legal, B would have been held as indorser as every accommodating indorser is. The same if more accommodating indorsers sign.

CH. 179.  
Art. 18.

3 Johns. Ca.  
66, Wilkie v.  
Roosevelt.—  
Also 2 Johns.  
Ca. 60, Jones  
v. Slake.

§ 10. To an absolute deed of conveyance of real estate upon trust, usury cannot be pleaded. Nor will the court set this deed aside on the score of usury.

1 Johns. Ca.  
158, Denn v.  
Dodds.

The plea of, in bar, must state the sum lent, and the sum included in the contract for interest and forbearance.

Kirby, 143.

§ 11. A, residing in Massachusetts, and owning land in New York, entered into a contract in Massachusetts with B, an inhabitant of New York, for the sale of the land to him. B gave his bond to A for the consideration money, payable in four years, and also four promissory notes, payable in one, two, three, and four years, for the interest on the bond, at the rate of six and a half per cent. A executed to B, a bond conditioned to execute a conveyance to him of the land on the payment of the bond and notes. In an action A brought against B, on three of the notes, B pleaded usury. Held, the notes were usurious; for the law of Massachusetts was to govern the case. Six and a half was more than legal interest in Massachusetts, but less than legal interest in New York, where it was seven per cent.

2 Johns. Ca.  
270, Van  
Schaick v.  
Edwards.

§ 12. *Certain principles as to usury in Pennsylvania.* It seems, there, the plea of usury goes only to the usurious part of the debt, and not to the *bona fide* part. Therefore, where usurious interest was included in the note &c., though the plt. could not recover the whole amount where usury existed, and was pleaded; yet held, he could recover and have a verdict for the just principal and legal interest: also held, if a man takes usurious interest, he incurs a forfeiture; but in an action for the loan, the deft. cannot plead usury.

2 Dallas, 92,  
Wycoff v.  
Longhead.

Also held, that any security for the payment of money may be purchased at any rate without incurring the penal-

1 Dallas, 217,  
Musgrove qui  
tam v. Gibbs.

CH. 179. ties for usury : so in another case held, a fair purchase may  
 Art. 18. be made of a bond or note, even at twenty or thirty per cent. discount, without incurring the danger of usury.

3 Cranch,  
 180, *Levy v.*  
*Gadsby.*

§ 13. If A lend money to B, who puts it out at usurious interest, and agrees to pay A the same rate of interest which he is receiving on A's money ; this is usury between A and B ; and an indorser of B's note to A, may plead usury and avail himself of it in an action against him. The court exclusively decides if a written contract be usurious or not.

6 Cranch,  
 252, 254, *De-*  
*butts v. Ba-*  
*con.*

§ 14. So if an agent, permitted by his principal, sell eight per cent stock and apply the money to his own use, and when pressed for payment, gives a mortgage to secure the re-payment of the amount of the stock with eight per cent. interest thereon, this is usury, and may be pleaded in bar of an action on the security to his principal.

5 Com. D.Pl.  
 2, W. 23.—3  
 Mod. 35.—  
 Cro. Car. 501.

§ 15. Usury may be pleaded without reciting the statute ; but the deft. by his plea, must shew the usurious agreement specially. He must expressly aver the agreement was for giving day of payment ; and that it was corruptly agreed. Plt. may directly deny this agreement ; or say, that it was lawfully agreed, and traverse the corrupt agreement pleaded by the deft. : so that it was a lawful debt, and traverse &c.

Clift. 185.  
 Burr. 287,  
*Cooke v.*  
*Ratcliffe.*

§ 16. So if the deft. plead usury, and state a corrupt agreement, in an action on a note, the plt. may reply that the note was given for a just debt ; *absque hoc*, that it was agreed in manner and form as the deft. pleads ; and if the deft. avers the manner of the agreement, the plt. may traverse the averment. Hard. 418.

6 D.& E. 460,  
*Grimwood v.*  
*Barrel.*

§ 17. This was debt on a bond dated July 20, conditioned to repay the principal with interest, at five per cent. from June 24, preceding. Deft. pleaded usury, that there was a corrupt agreement between the plt. and deft., that the plt. should lend the principal sum on 20th July, to be repaid with interest from June 24, preceding, which exceeds legal interest, and that the bond was given in pursuance thereof. Plt. replied, and traversed the corrupt agreement. Deft. demurred. Judgment for the plt., because the demurrer admitted the non-existence of any corrupt agreement. Special declaration, *qui tam*, and how necessary.

1 H. Bl. 283,  
*Barbe v.*  
*Parker.*

1 Haw. c. 82,  
 sec. 24.—Cro.  
 J. 140.—Sec.  
 25.—5 Bac.  
 422.

It is laid down for law, that in a plea of usury, the deft. must state the whole matter especially, because within his knowledge. But in an information it is sufficient to state the corrupt bargain generally &c. Information must state the time and place of the corrupt bargain &c ; but a note may be made at D, though dated at C. And here the corrupt bargain, was not on taking the note ; but in the after agree-

ment, for usury; and it was not suggested that this agreement was not proved as laid.

CH. 179.  
Art. 19.

Rast. Ent. 689, is a long special plea of usury, not only stating the contract and usurious taking, but also the substance of the statutes against usury; but there is a general count, stating the loan and corrupt taking of usury, subsequently; but it does not appear the loan was usurious. The informer is not supposed to be privy to particulars. Haw. P. C. 248.

§ 18. In these authorities it is only stated, that a charge of extortion must be particular.

5 Bac. 422.  
2 Ld. Raym.  
1144.—Salk.  
680.

In Crown Cir. Comp. 743, 744, only one precedent of an indictment for usury, that specially states a legal contract of loan, and an after usurious taking.—Indictment; for that D. S. at —, August 20, lent and advanced to one R. J. £5, to be paid to the said S. January 8, then next; and afterwards, 8th of Ann, at —, unjustly and corruptly received and had of the said R. J. for deferring and giving day of payment of the said £5, for the time aforesaid, 12s. 6d., which exceeded &c. This was general, but the loan was legal. Judgment reversed for another cause, so no occasion to object to the indictment's being so general. On the whole, if there be a corrupt loan and usurious original contract, it is best in pleading to state them specially in all cases, as those are of the essence of the offence, and ought to be proved and so laid. But if the loan be fair, and usury is subsequently taken, it is at least in counts and informations, enough to state the loan and original contract generally, as mere inducement, and the after corrupt usurious taking specially, as being the very offence.

3 Ld. Ray. 34.

§ 19. If there was a corrupt loan, the information must state as to the loan, it was corruptly agreed. Cro. J. 104, 440.

5 Bac. 422.

ART. 19. *The statutes of limitations are also general bars in most actions.*

§ 1. The statutes have been properly divided into two classes, those in *personal* actions, and those in *real* actions; these acts have been largely pleaded and considered as cases have occurred in several chapters, as Ch. 91; Ch. 99; Ch. 75, a. 18; Ch. 81, a. 4; Ch. 90, a. 1, r. 12; Ch. 92, a. 2; Ch. 152, a. 1; Ch. 171, a. 10; but specially Ch. 161, in personal actions on contracts, and Ch. 178, a. 25, in Real Actions. In *personal* actions in regard to *contracts* and *torts*, has been made a further division.

Forms of  
pleas, 2 Ch.  
on Pl. 449,  
450.

§ 2. Some principles and cases in matters of *torts* and panalties in personal actions; and a few other cases now remain to be considered; and it is a general principle that acts

Ch. 179. of limitations do not bar the debt or right, but only the remedy; the debt is not absolved. 2 Cranch, 279.

Art. 19.

§ 3. Held, the act of Congress of April 30, 1790, limiting prosecutions on penal statutes to two years &c. extends as well to penalties after as before that act passed; and to actions of debt for penalties as well as to informations and indictments.

2 Cranch,  
Adams *q. t. v.*  
Woods, 336.

2 H. Bl. 14,  
Godin *v.* For-  
res.—2 East,  
254.

§ 4. If an officer of the customs seized goods as forfeited by the revenue laws, he must be sued *within three months after the actual seizure*; though a suit be in the exchequer chamber for the condemnation of the goods, pending at the expiration of the three months. These acts are only *legal impediments*. 2 Cranch.

4 Cranch,  
164, Hopkiss  
*v.* Bell.—3  
3 Cranch,  
174, 454.

§ 5. Held, the Virginia act of limitations is no bar to a British creditor's demand, on a promissory note, dated August 21, 1771; though one of the *plt's.* was in the country after the treaty of peace, viz. in 1784, and remained here till he died in 1785.

5 Cranch,  
338, Brent *v.*  
Chapman.

§ 6. Five years' *adverse* possession of a *slave* in Virginia, gives a good title upon which trespass may be maintained; this action was against the marshal of the District of Columbia, who had seized the slave on a *fi. fa.*; so ditinue; 3 Hen. & M. 57, Newby admr. *v.* Blany.

5 Cranch, 15,  
Maxwell &  
al. *v.* Wilson.

§ 7. *Merchant's Accounts*,—(see Ch. 161, a. 5.) Held, the exception in the statute of limitations in favor of merchant's accounts, extends to all accounts current, which concern the trade of merchandize. It applies as well to actions of *assumpsit* as to actions of *account*. An *account closed* is not a stated account. It is not necessary that any of the items should have been charged within five years; nor that the declaration should aver the money to be due upon an open account between the merchants. Accounts between principal and factor are not within the act. 2 Dallas, 264.

2 Johns. R.  
200, Ram-  
chauder *v.*  
Cammaud.—  
1 Johns. Ca.  
76.

§ 8. But in this case, decided in the state court of New York, it was held, that this exception extended only to open and current accounts; agent to collect debts not a factor; 3 Cranch, 454; a debtor within the British lines viewed as out of the state.

1 H. Bl. 631,  
Wattersham  
*v.* Carlisle.

§ 9. A lends money to B, and B gives him a bill to be paid in a year; at the end of a year the action accrues, and the six years are to be computed from the time the bill becomes due.

3 Johns. R.  
523, Kead *v.*  
Markle.—3  
Willa 345.

§ 10. Goods were taken on execution, afterwards set aside for *irregularity*. The owner of the goods sued in trover, and the deft. plead the act of limitations. Held, the execution being irregular, was a nullity, and the act began to run from the first taking of the goods, and not from the time the execution was set aside erroneous one void only from the *reversal* &c.

§ 11. Action against an *executor*, the *plt.* may state the testator being indebted &c.; after his death the executor in consideration &c. promised to pay &c.; and the *def.* may set up any defence which he could, if the *assumpsit* was laid from testator; and the judgment will be *de bonis testatoris, si non*, &c. 6 Johns. R. 112, Whitaker v. Whitaker. CH. 179. Art. 19.

1 Bl. 102.

§ 12. The *def.* being arrested by the sheriff, promised to settle with the *plt.* Held, this was sufficient to take the case out of the statute. See Ch. 161, a. 9, s. 7. 4 Johns. R. 461, Sluby v. Champlin.

§ 13. *Though one partner*, after the partnership dissolved, cannot bind the other by a new contract, yet his acknowledgment of a previous debt due by the partnership will bind the other partner so as to prevent him from pleading the statute of limitations; and admitting an account to have been stated by him, or stating an account by which a balance appears due, is a sufficient acknowledgment by one partner to take the case out of the statute. 6 Johns. R. 267, Smith, *adr. v. Ludlow & al.*—3 Johns. R. 536.—4 Johns. R. 461.—2 Saund. 63, note 6.

§ 14. A promised to pay the debt barred by the act, in certain specific articles. Held, this promise was conditional, and the *plt.* was bound to show he offered, and was ready to accept the specific articles. 4 Esp. N. P. Ca. 36. 6 Johns. R. 407, Birch v. Barnard.

§ 15. The plea must be consistent; as in an action on a note payable *by instalments*; plea in bar to the several causes of action, *except the last instalment*, "That the said several causes of action did not, nor did any of them, accrue within six years;" *plt.* demurred specially to this plea. Held, though some of the instalments be barred, and others not, yet the plea was bad, as the introduction to it, and the body of it, were inconsistent. The *def.* by the introductory part of his plea confined his answer to a part only of the declaration, as it was not meant as an answer to the last instalment; and though the subsequent matter amounted to an answer to the whole, all the causes of action, the *plt.* was entitled to judgment on the last instalment, to which the introduction of the plea did not apply on a general rule in pleading laid down in Weeks v. Peach, 1 Salk. 179, to wit: if a plea be pleaded as an answer to the whole, and the matter pleaded be only an answer to a part, the whole plea is bad, and the *plt.* may demur. 2 Bos & P. 427, Gray v. Pindar.

§ 16. *Offset of debts &c. another state*. In actions brought in *New York*,—held, the *def.* could set off demands he had against the *plt.* which arose when both parties resided in *another state*, and which, if sued for in that state, would be barred by its acts of limitations, provided six years had not elapsed since the *plt.* came to reside in *New York*; also, held, the courts of *New York*, in actions on foreign contracts, are not governed by statutes of limitations in other states, where such contracts were made. And 2 Mass. R. 84, held a statute 3 Johns. R. 263, 268, Ruggles v. Keeler.—3 Wils. 145.—2 W. Bl. 723.—2 Johns. R. 198.—See 1 Caines, 402; the remedy on a contract is on the law of the state where sued.

CH. 179. of limitations of *New York* could not be pleaded in bar of an action in *Massachusetts*, though sued by inhabitants of *New York* on a note made *there* by the defts., citizens of *Massachusetts*.  
 Art. 19.

5 Johns. R.  
 132, Hubbel  
 v. Coudry.

§ 17. Held, the statute of limitations in *New York* was a good plea in bar to an action on a judgment rendered in Connecticut; but was not this clearly going on the ground that a judgment in *another* state, has only the force and effect of a mere *foreign* judgment? ground at least very questionable. See Bartlett & Knights and Briggs & Bissell &c. ante. The court will not notice a limitation unless pleaded. 2 Cranch, 276.

1 Dallas, 239.

§ 18. Held, in *Pennsylvania*, that the court will never open a regular judgment to let in the plea of the statute of limitations; it must be plead in season or not at all.

2 Dallas, 217.

§ 19. Held also, in *Pennsylvania*, that the statute of limitations is a good plea in bar to an action brought by a citizen of the *United States* resident in *South Carolina*, against a citizen resident in *Pennsylvania*.

2 Cranch,  
 343, Lindo v.  
 Gardner.

§ 20. *Quære*, if the statute of limitations can be given in evidence on *nil debet*. 1 Cranch, 462.

2 Cranch,  
 272, Ogden v.  
 Blackledge.

§ 21. Held, the 9th section of the act of *North Carolina*, passed in 1715, directing that unless the creditors of deceased persons should make their claims within seven years after the death of the debtor, they should be barred, was repealed by act of 1789, Ch. 23; notwithstanding the act of 1799, declaring the contrary; the act of limitation of *North Carolina* was suspended as to British creditors during the revolutionary war; and till the year 1793, Ch. 23, legal impediment existed in *Virginia* to their recovery; 2 Cranch, 180; a legislature cannot declare what a law was, but what it shall be.

§ 22. In the numerous prosecutions and actions brought to recover *statute penalties*, usually limited to be sued within certain periods of time fixed by the statutes giving them, it is generally incumbent on the prosecutor or plt. to shew he has brought his suit within the limited time. As the proviso limiting the time is in the nature of a condition, that must be complied with; and the question is commonly a mere question of fact, if the suit be commenced in the specified time. As it is an essential part of the plt's. case he sue in season, a part of his title to the penalty, the deft. has no occasion formally to plead the limitation, but may insist on it at the trial, and oblige the prosecutor or plt. to shew he began his suit according to the provisions of the statute or statutes on which he claims the penalty.

Lofft, 86,  
 Richardson  
 v. Finn.

§ 23. Plea *non assumpsit infra sex annos*; plt. proved the deft. within six years, said to one whom he met in the fair, that he came there to avoid the plt., to whom he was in-

debted. Held, sufficient to take the case out of the statute. So where the creditor said to the debtor, "You owe me such a sum;" "No," said the debtor, "*but we will settle the account.*" CH. 179.  
Art. 19.

§ 24. But a promise by the debtor to pay a debt, barred by the statute, if the creditor will come to an account, is no answer to the statute of limitations. The difference between these two last cases is very small; and see *Bryan v. Horseman*, 4 East, 599, and *Rucker v. Hannay*. 1 L. Raym.  
741, Sparling  
v. Smith.

§ 25. The plt., administrator, sued for an old debt due to the intestate, but outlawed. The deft., the debtor, acknowledged to the plt., administrator, he owed it. Held, this acknowledgment did not support the plt.'s declaration, though made within six years, but after the intestate's death; the promise was laid to the intestate, but why does not such an acknowledgment confess *the debt is still existing*; and see *indebitatus assumpsit*; and the administrator could not reply a promise to himself, as that would be a departure. 6 East, 387, *Macfadgen v. Olivant*. 3 East, 409,  
Sarell, admr.  
v. Wine.—  
Willes, 27,  
Hickman v.  
Walker.

§ 26. Case against a former sheriff, for the default of his deputy in not taking sufficient bail. Held, the four years' limitation on the act of 1796, Ch. 71, commenced only from the return of *non est inventus*; that then only the cause of action accrued. The bail, one person, was sued and committed, and took the poor debtor's oath; law requires two, and if reputed good at the time, it is enough, though afterwards they become unable to pay &c.; but the officer takes one only at his peril. 12 Mass. R.  
127, Rice &  
al. v. Hosmer.

§ 27. Held, the statute of 1807, Ch. 74, for the limitation and settlement of real actions, does not extend to a case where one is in possession under a contract for a title from the owner of the land, though the time is expired within which he could demand a title from the owner. 12 Mass. R.  
329, Knox &  
al. v. Hook.

§ 28. Error to the Circuit Court of the district of Georgia, held the statute of limitations of that state does not require an entry upon lands within seven years after title accrued, except where there is an *adverse* possession, or a title to be defeated by such entry; for in such case the possession accompanies the title. 4 Cranch,  
367, Shear-  
man v. Ir-  
vine's Les-  
see.

The creditor removes his disability to sue merely by coming into the State, if the debtor at the time be in it, and suable. 3 Cranch,  
174, Fawes v.  
Roberdeaux's  
ex'rs.

§ 29. Error to the Circuit Court, Columbia. Action of trespass for *mesne profits*, after a recovery in ejectment by the plts. against the deft., who pleaded the act of limitations. Plt. replied that C., the wife of one of the plts., and E., the wife of another, in whose right they sue, were *femes covert* when the cause of action accrued, and still are &c.; that Kitty Hunter, one of the plts., was a *feme covert*, and that 7 Cranch,  
156, Marstel-  
ler v. Mc  
Clean.

CH. 179. the other plts., in whose right the suit was brought, were infants when the cause of action accrued; also at the commencement of the action. To this replication deft. demurred, and judgment for him; for to avoid the act as to an action by joint-tenants, *all* the plts. must be under a disability to sue: And 1st, The replication did not state that Kitty Hunter did continue a *feme covert* until less than five years next before the action was commenced, and if her disability was removed five years before &c., she was barred: 2. The replication being joint and bad as to one, was bad as to all; and when the act runs against one of two or more plts. entitled to a joint action, it bars the action. And 4 D. & E. 516.

7 Cranch,  
168, King v.  
Riddle.

§ 30. A recital in a deed is evidence to take the case out of the act. Nor is an insolvent discharge in Columbia a bar to an action. Riddle brought *assumpsit* against King, for monies paid to his use: 2. A special count, stating he was taken in execution, and gave a prison-bounds' bond with sureties, forfeited, and judgment against them; that the plt. (not bound in it) at King's request, paid one-sixth of the judgment; one-sixth being \$250,52 &c. Plea, the act of limitations &c., five years, Virginia. July 15, 1804, deft. signed and sealed a paper, reciting the plt. and others had become his sureties to a large debt to A &c.; had paid &c., and being desirous to secure them, assigned notes to that end. Held, sufficient to take the case out of said act. Action brought July 1, 1809; so the deed was evidence the plt. paid. Discharge under the insolvent act only discharged the *person*. Pleading the act in Virginia, in chancery. See Ch. 226, a. 15, s. 3.

7 Cranch,  
350, Bond &  
al. v. Jay.

§ 31. Marchants' accounts in Maryland. Her act in the words of Massachusetts act &c., as to merchants &c., but limits *assumpsit* to three years. The plt., a merchant of Pennsylvania, brought *assumpsit* against the deft., a merchant of Maryland, on an account that grew out of their trade with each other as merchants. Deft. pleaded this act. Plt. replied, that he, residing in Pennsylvania, and the deft. were mutually employed in trade and merchandize, of, and concerning which, the said several sums of money in said declaration mentioned grew due. Deft. rejoined, the plt. came within the State of Maryland in 1797; and that the original writ in this case issued July 5, 1808, and not before. Plt. demurred: good.

On the act of limitations of Maryland, passed in 1715, the exceptions as to merchants extended only to those not resident in Maryland. Held, the plt. did not, in the sense of the act, come into Maryland. The rejoinder should have

averred, he become a resident there more than three years before the commencement of the suit. 8 Cranch, 98 : three years is the limitation in Maryland. Ch. 179. Art. 19.

§ 32. To take the case out of the act, the acknowledgment must go to the fact, that the debt is still due ; and an acknowledgment which goes to the original justice of an account, is not enough. 8 Cranch, 72.

§ 33. The words, *beyond seas*, in the Georgia act of limitations, means the same as the words, *out of the State*. Held, in an action of ejectment brought by Murray's lessee v. Baker & al. in the Circuit Court for the district of Georgia, to recover certain lands in that State. The lessors of the plt. had been in Virginia. Defts. and their ancestor had been in possession about twenty-five years. Georgia act of limitations was passed March 21, 1767, and limits real actions to seven years, with the usual exception of infants &c., and persons beyond seas. To these it allowed three years after the disability removed. Ireland is beyond sea as to England. 3 Wheaton's R. 541, Murray's lessee v. Baker & al. Show. 90.—See Ward v. Hallam, 2 Dallas, 217, contra.

§ 34. *Assumpsit* for \$750, had and received by Seaver, the deft's. intestate. Writ dated February 21, 1816. Facts ; October 10, 1809, the plt. agreed to buy of said intestate a message &c., and paid him therefor the \$750, and received possession, and continued till February 1, 1816, and then was evicted by the intestate's heirs. The intestate promised to convey &c., but no time set for him to give his deed to the plt., of course the intestate had during life to give it, unless hastened by request. He died and no deed given. Plt. sued to recover back the \$750, on the ground the consideration failed. Deft. pleaded in substance, *actio non accrevit infra sex annos*. Plt. replied said facts nearly ; *hoc paratus*. Deft. demurred specially ; five reasons : One, because the plt. did not join the proper issue, deft. tendered ; and held, he should have done this, (if said agreement could be proved by parol.) The plt. if entitled to this evidence at all, was entitled to it on the general issue tendered by the deft. Plt. had leave to amend his replication, paying costs, after defts'. demurrers were filed. See 1 Chitty on Pleadings, 554 ; 2 Do. 604 ; see Oxford, mayor of, v. Richardson, Ch. 68, a. 2, s. 5 ; Ch. 180, a. 10, s. 34 ; Sellon's Practice, 468 ; First Massachusetts Turnpike v. Field, Ch. 161, a. 10, s. 1. 14 Mass. R. 425, Eames v. Savage, adm'r.

§ 35. *Scire facias* to affirm a judgment against an administrator. Plea, the Probate Court limited the time to exhibit the claims against the estate of the intestate. Held, the plt. might reply, and show the claim was so circumstanced that it could not be ascertained in the time limited. Kirby, 36, Adams v. Cleveland. —Prevost v. Grats.

CH. 179.  
Art. 20.

  
Grats v. Prescott.

§ 36. *Limitations as to trusts in equity.* 1. He that alleges a trust, must prove it: 2. Generally, length of time is no bar to a trust proved once to have existed; and no relief if fraud be proved: 3. Length of time operates by way of presumption against the imputation of fraud: 4. Forty years and the death of all the original parties, affords a presumption of the discharge of a trust, proved once to have existed by strong circumstances. In the year 1770, the conveyance was absolute, but a secret trust was claimed in favour of the grantor. The trust was not clearly proved. A transaction in 1775, among the original parties fixed the full value of the land, and this seems to have been the last transaction among them, above forty years before the suit. Probably few more such suits will evince the necessity of statute limitations, even in cases of resulting trust.

Fisher's ex'r.  
v. Duncan &  
al.—1 Hen. &  
M. 563, 577.

§ 37. Executors and administrators—their acknowledging a debt of the deceased does not take it out of the acts of limitations; for the executor or administrator cannot by his promise, bind the estate of his testator or intestate.

§ 38. *Spotswood v. Dandridge & al.* 4 Hen. & M. 139, 145. If the deft's. possession be *fiduciary* for the plt., or one he holds under, it does bar him by the act of limitations, though continued more than five or six years, as in such case the deft's. possession is the plt's. *Secus*, if the deft. possess in trust for third persons.

Brooke's  
adm. v. Shelly,  
4 Hen. &  
M. 266.—1  
Rev. Code, p.  
163, s. 56, A.  
D. 1792.

§ 39. Virginia act of limitations as to accounts against the estates of persons deceased, directing the judges to strike out all items five years old at his death, extends only to open accounts, and not to those settled or acknowledged by the deceased within five years before his death. See *Beale v. Edmundson*, 3 Call, 514; see Ch. 36, a. 14.

Virginia acts  
revised.

§ 40. A long act of forty-three sections in Kentucky, as to slaves. See *Toulmin's Kentucky Laws*, p. 304 to 313; statutes February 8, 1798, respects Slaves, Free Negroes, Mulattoes, and Indians. By this, no person is a slave in the State, except such as, October 17, 1795, were slaves; and except the descendants of the female slaves. No negro or mulatto can be a witness except in pleas of the State, against negroes and mulattoes; and except in civil pleas in which they alone are parties. The other forty-one sections regulate minutely the affairs of slaves. Act of November 29, 1799, appoints patrolers to see to them; and statute of January 16, 1798, directs the apprehending and securing runaways.

ART. 20. *Special matters of excuse or justification are bars to most actions, real and personal.*

B.N P. 17.—  
2 Esp. 447.—

§ 1. Justification is insisting on something that made it  
Stra. 872.—Stra. 509, *Phillips v. Biro*.

lawful for him to do the fact laid to his charge. Matter of justification can never be given in evidence, except where it cannot be pleaded. If two justify, and the plea be good as to one, and bad as to the other, it is bad as to both; for a joint plea cannot be good as to one of the defts. and bad as to the other.

CH. 179.  
Art. 20.

§ 2. A man cannot justify a trespass, unless he confess it; 3 Salk. 279. and the justification must go to the whole. This proposition is universally true; for it is absurd to justify an act or thing the party justifying does not admit to be done; and there can be no justification of the act, or thing, matter, or transaction, except the whole be justified.

§ 3. Where a man may justify entering upon another's land. See Ch. 2, a. 2, s. 3, 4, remedies by acts of the party. So where one may justify entering an inn. See Inns. So justification taking damage feasant. See Ch. 2, a. 5; and Replevin.

§ 4. So a master may justify moderately correcting his apprentice, or servant, scholar, or seaman, for negligence, or for misbehaviour; but not his wife. So a master may justify the assisting his servant in an action at law.

1 Bl. Com.  
428, 429.

§ 5. Under process against Richard Cole, one cannot justify seizing the goods of Aquila Cole; as in trespass by him against the deft. and three others, for breaking the plt's. house, seizing and carrying away his goods. All the defts. justified, and said, the plt. was indebted to two of them, who sued him by the name of Richard Cole, and the writ was directed to Bowles, another deft., who was sheriff &c., who by Henderson, the other deft. caused the said Aquila Cole by the name of Richard Cole, to be summoned &c.; that he did not appear &c., whereupon the *distringas* issued &c., on which the said Henderson levied the goods &c. General demurrer. Held, a bad plea; for the defts. could not seize the goods of Aquila Cole, on process against Richard Cole; and the averment in the plea that Aquila and Richard are the same person, will not help the defts., as they have not also averred the plt. was known as well by the one name as the other. See 2 Stra. 1218.

6 D. & E. 134,  
Cole v. Hend-  
son.

§ 6. Special justifications in the various kinds of actions above considered; and various branches in some of them; as in Case on Torts, Ch. 58, 59; as Assessors &c., Ch. 63; Words in Defamation are true &c., Ch. 64; Disturbance complained of, justified, Ch. 65; Arrests justified, and Re-seizers excused, Ch. 66; Fences, justifications, taking *damage feasant*, Ch. 167; Ferries, defts. justify building a bridge &c., Ch. 68; Fishing &c., justification, taking the plt's. net on the deft's. land; deft. justifies on navigable waters; justi-

CH. 179. fies taking fish, Ch. 71; deft. justifies stopping the plt's.  
 Art. 20. pipe flowing his land &c., Ch. 74; deft. justifies removing a  
 ~~~~~ Nuisance, Ch. 75; justifications by officers in many cases  
 Ch. 76, a. 6; justifies taking as his emblements, a. 11; justifies  
 taking toll, Ch. 78; justification in waste, as cutting timber  
 for repairs &c., trees by license &c., Ch. 79; justifications,  
 rights of ways, Ch. 171; justifications, taking *damage fea-*  
*sant* &c. in replevin, Ch. 172 and 173. So various pleas  
 of justification in assaults and batteries, and in other tres-  
 passes *vi et armis*.

§ 7. Pleas of justification are properly, in cases of *torts*, charged against defts. not *contracts*; as to them the deft's pleas usually are a denial he ever made the contract the plt. declares on; or that the deft. has performed it; or that it has been discharged; but pleas of *excuse* are often made in both cases. The plea of justification or of excuse, here intended, is never a *formed set* plea, but a *special* one; always specially stating the facts or matters relied upon, as justifying or excusing the act or thing done by the deft. Hence, it is ever framed according to the facts in the case, with legal precision, and a correct knowledge of the law arising on those facts. Though this plea is thus always to be formed according to the essential facts in each case, and is not in the whole formal or technical; yet some few features in it are so; as the *actio non*, the *traverse*, if one; the *hoc paratus verificare*, or the *conclusion to the country*, or *record*. And such features or parts are in every case, to be pleaded with the strictest regard to the technical rules of pleading. The special pleas, as before stated, vary almost infinitely in different actions, according to the nature of the matter, excusing or justifying; but generally in forming a good special plea in bar, the only grounds to be relied on, are good sense, good logic, and sound legal knowledge.

Holt on Li-  
bels, 282.

Law's Plead.  
120 &c.

§ 8. Special pleas in bar include all special matter in denial, avoidance, discharge, as well as of excuse and justification; also matter of *estoppel* may be specially pleaded. Pleas of avoidance confess and avoid, as pleas of infancy, coverture, duress, usury, gaming, &c.: so pleas of discharge, as actual payment; settlement by arbitration; foreign attachment; former recovery by release &c.; set-off, alienage, outlawry of the plt., bankruptcy: so already considered: so various matters of *excuse* constitute special pleas, as tenders: so *son assault demesne*, amicable contract, unavoidable accident, &c. See former chapters.

Kirby, 110,  
Wooster v.  
Parsons.

§ 9. Trespass for false imprisonment. Dft. justified under regular process. Held, the plt. could not reply, the

cause of action was not within the court's jurisdiction, if the fact did not appear on the record. CH. 179.  
Art. 20.

§ 10. Sheriff's plea, he had no power to retain in prison the *marshal*—how bad. Case against the sheriff for the escape of A. Deft. pleaded, that at the alleged time of the alleged escape of A, he was marshal &c.; and by virtue of the statute authorizing the use of gaols in Connecticut, for the confinement of prisoners under the authority of the United States, he was keeper of the gaol wherein he was confined, and equal in authority with the deft., and that the deft. having no right to detain him, permitted him to depart. This plea in justification was held insufficient; and further held, the plt. might reply, that no person had been at any time committed to, or confined in, Haddam gaol, under the authority of the United States. If there had been, so that the marshal had become keeper in fact, the justification might have been good. 2 Day's Ca.  
300, Parsons  
v. Stanton.

§ 11. A plea merely negating facts is not a special plea, nor can it be a plea of justification. 2 Caines' R.  
60, &c.

§ 12. The question of justification is a question of law, and not of fact. Hence, the jury may find the facts that constitute the justification; but the court is to draw the conclusion from them; and if the jury draw the conclusion, the judges may disregard it; as where the jury found certain facts, and thence concluded the voyage was broken up, and so the master justified in returning to the port he sailed from instead of pursuing his voyage. The court disregarded the conclusion, and decided, that the question if broken up or not, and if he was so justified, was a question of law, and held, he was not justified, because he acted from fear founded on misrepresentation: insurers discharged. A voyage direct from the United States to a French colony, was allowed by the British orders in council of November, 1807. 6 Cranch, 71,  
82, King v.  
Delaware  
Ins. Co.

§ 13. *Office judgment in Virginia, and plea as to it.* This was a writ of error on a judgment of the Circuit Court of the District of Columbia, sitting in Alexandria, in a case in which Virginia law was the rule; and held, where an office judgment is rendered in a term, and another term passed, it was a matter of mere discretion in the court to admit or not a special plea to be filed to set aside such judgment. This action was originally brought in the Court of Hustings for the town of Alexandria, and transferred to said Circuit Court by act of Congress of February 27, 1801. This office judgment was entered at the rules held at the clerk's office. For want of plea a writ of inquiry was awarded &c., returnable &c.; and not executed according to the course of the Court of Hustings; and the deft. below offered a special Cranch, 110,  
116, Resler  
v. Shehee.

CH. 180. plea out of time, justifying his causing the plt. below to be criminally prosecuted, for which he sued; and the court refused the plea; and the deft. below, Resler, brought error, and decided as above, and judgment affirmed.

Art. 1.

§ 14. Judicial proceedings in the Virginia part of the District of Columbia, in Virginia, and in Kentucky, (till 1792, a part of Virginia,) are all nearly on the same principles. See a summary in Toulmin's Kentucky Law, p. 189 to 270; as to actions, costs, pleas, judgments; endorsement of writs, bail, appearance, cases of *caveats*; bills in chancery, and proceedings thereon; writs of *ne exeat*, injunctions; absent defendants, writs of *certiorari*, changing venues, bills of exceptions, suits of paupers, depositions, notice, forms of writs, champarty, &c.; conveyances, partition, waste, aliens holding lands; frauds, &c.; summary proceedings, escape, executions and insolvents, trustee suits, lands made liable to the payment of debts; assignments of bonds and other writings, bills of exchange, usury, mode of calculating interest, and advertisements.

## CHAPTER CLXXX.

### PLEADINGS, REPLICATIONS, &c.

Ch. 161, a.  
15.—Ch. 173,  
a. 1.  
Forms of re-  
joinders &c.  
seizures &c.  
referred to  
10 Wentw.  
index of re-  
ferences 102  
to 105.  
Yelv. 151,  
166, 170.

*Replications* and rules as to certainty and to avoid *duplicit*y, *double pleas*, *departures*, *repugnancy*, *argumentative pleas*, *negative pregnant*,—as to *surplusage*, *traverses*, *proferts*, *sham-pleas*,—*what substance*, *what form*,—matter pleaded according to its operation in law,—so to avoid prolixity.

#### ART. 1. *Replications &c.*

§ 1. These may be general or special, also, general as by *new assignment*, or was of the deft's. own wrong, and without the cause he alleges; as already shewn in *Trespass*, Ch. 172 and 173; or they may be special; 4 Dallas, 440; 3 D. & E. 376.

§ 2. These and all other pleas must be clear and concise, in proper order, and in proper time,—cannot confess and avoid, also traverse.

§ 3. Wherever the deft. properly offers an issue to the country &c., the plt. replies by merely saying, *and the plt. likewise*; but when the deft. concludes his plea with a *verifi-*

CH. 180.  
Art. 1.

cation in bar, the plt's. replication begins with saying that he, for any thing by the deft. above in pleading alleged, ought not to be precluded from having and maintaining his action aforesaid thereof against the deft.; because the plt. says &c.; so states his special matter, and concludes with a *verification*, or to the country; as the case may be. If the deft. pleads in abatement, the plt. replies, and says, his writ aforesaid, for the reasons before alleged by the deft., ought not to abate, because the plt. says; so states his reasons, and concludes as above. The special reasons, or facts, or matter, that may constitute the body of a replication, as the body of a special plea, may be almost infinitely various, and will be found scattered and dispersed through every part of special pleadings in bar or abatement, to which reference must be had. Also, in replications, *protestandoes* are inserted, and *oyers* and *proferts* of deeds, as to which reference must be had to the rules of pleading in regard to *protestandoes*, *proferts*, and *oyers*. If the deft. pleads a fact as appearing on the record; as the appearance of a party in court &c., as appears by the record, and this he is ready to verify by the record &c.; the plt. replies, *precludi non* &c., because, he says, there is no such record of the said D. before —, at —, aforesaid, on —, remaining in the same court of —, at —, as the said D. hath alleged, and this &c.

§ 4. The body of the replication is usually consisting of matter suitable to each kind of action, as account, *assumpsit*, debt, covenant, ejectment, replevin, trespass, trover, waste, &c.; as to which, see pleadings in the several kinds of actions above; therefore nothing more need be inserted here as to replication, &c. than some general rules and principles applicable to them generally. If the deft. plead the act of limitations, and the plt's. case come within any of the exceptions, he must reply the same specially; 3 Hen. & Mun. 89 to 115, Lewis, executor, v. Bacon's legatee and executor.

§ 5. If the plt. declare generally, and the deft. justifies the plt. in his replication, must shew a title; this is made necessary by the deft's. justification; and as a defect in the plt's. declaration is often aided by the deft's. plea in bar, so the deft's. plea is often aided by the plt's. replication; as in debt on a bond to make an estate to A. If the deft. pleads he enfeoffed B to A's use, which is bad, without shewing that A was a party, or had the deed &c.; yet if the plt. replies, that he did not enfeoff, this aids the bar. So if the deft. pleads an award &c. uncertainty, and the plt. makes a replication that imports the award &c. to have been made, this aids the uncertainty of the bar. So if the plt. by his replication, shews he has no cause of action, judgment must be for the

5 Com. D.  
Pleader C.  
40, 85. 5  
Com. D.  
Pleader E.  
37, Cro. El.  
825.—8 Co.  
133.—Lutw.  
609.—Hob.  
14.—1 Lev.  
195.—3 Co.  
62, b.—8 Co.  
120.—2 Wills.  
150.

CH. 180.

Art. 1.

deflt. though his bar is defective ; for the court will judge on the whole record ; as in escape at *London*, the deflt. pleads a retaking upon fresh suit at *Stoke* ; the plt. replies he was out of his view before the retaking ; this admits the taking on fresh suit, and then the plt. shall not have an action for the escape, though the retaking at another place would be a bad plea on demurrer ; but a bar that wants *substance* cannot be aided by a replication ; as if the deflt. pleads an accord, and does not shew a satisfaction, though the replication denies the accord, this does not aid the bar ; on demurrer the court looks for the first fault. Hence, if to debt on bond, the deflt. pleads payment *before* the day, it is not aided by the plt.'s tendering an issue.

Com. D. Pl. F.

4—1 Saund.

338, Attorney

General v.

Elliston.

Stra. 191.

§ 6. The replication ought to answer the whole plea ; if not, the plt. discontinues his action. See Discontinuance, Ch. 175, a. 11.

§ 7. But if the plea admits a non-performance by excusing, it is enough the replication meets the plea, and falsifies the excuse in all cases except awards.

1 D. &amp; E. 40,

Truman v.

Hurst.

§ 8. The replication must ascertain the matter to which it replies, as *assumpsit* on several promises ; the deflt. pleads infancy ; the plt. replies to part for necessary food, he ought to shew what part ; and part for clothes, ought also to shew what part ; replication bad in part is bad in the whole, except as to *suppluſage*.

1 Sid. 39.—1

Saund. 337.

—Mass. S. J.

Court, Essex,

1801, March's

Case.

§ 9. If there be several pleas, and the plt. replies *as to the said several pleas*, it is well, though he does not make a several replication to each plea in particular, and if the plt. begin his replication *precludi non* &c., and makes a general conclusion to the whole, yet they are several replications as well as if the plt. had said *precludi non* to each matter ; and one replication is often good to several pleas ; but this depends on the nature of the pleas. So it is truly said, the plt. cannot reply *double* ; this is true as to a plea containing a single point or matter only for a single issue ; but where a plea contains several substantive matters fit for several issues, the plt. may reply and offer an issue on each ; as in an action of defamation by libel, charging the plt. as being guilty on several occasions, and in several courts, and the deflt.'s plea justified as to each ; the plt. replied and answered to each distinct part of the plea, and concluded each distinct part of his replication with a verification, and said in each case for another plea in replying as to &c. ; but there was but one *precludi non* for all, and *protestando* for all ; and five issues were joined on the five distinct matters.

Ins. Cl.—2

W. Bl. 916.

§ 10. So in *assumpsit* for £40,—the deflt. pleads payment of £20, and a tender of £20 ; the plt. replied, and went to

issue on each point. A general replication need not be signed by counsel; 8 Johns. 322; 2 Wils. 74; Sellon. 372.

Ch. 180.  
Art. 1.

§ 11. But if the action be on a deed, as a bond, the plt. cannot reply new matter in the deed; but must set it out on *oyer*, as the best way to bring the new matter upon the record.

Stra. 227,  
Stibbs v.  
Clough.

§ 12. The conclusion of a replication, as praying judgment for his debt, and damages, &c. ought to be proper; but a bad conclusion in this respect is generally but form: hence not praying damages is aided on general demurrer.

Hob. 321.—1  
Saund. 98.

§ 13. Wherever a traverse is added there must be an averment; but if the replication deny the *whole substance* of the plea, then it must conclude to the country, especially if the replication contain no *new* matter, as in a complaint for flowing the plt's. land; plea justifying it by a prescriptive right, without paying damages. The replication traversing the deft's. *whole prescription*, concluded properly to the country, for the replication advanced no *new* matter; put all the matter of the plea in issue, and had the replication left the pleading open by *hoc paratus*, the deft's. could have rejoined nothing new; but if the replication select a particular fact in the plea, and traverse that, it must conclude with an averment; per Buller J. See Averment, Ch. 177, a. 9: may make a declaration certain; Yelv. 17.

Stra. 811,  
Baynham v.  
Matthews.—  
Doug. 95.—  
Mass. S. J.  
Court, Essex,  
Nov 1816,  
Johnson v.  
Kitteridge &  
al.—2 Wils.  
113.—2 D. &  
E. 142.—  
Doug. 428,  
Smith v.  
Dovers.

§ 14. So the replication must conform to the declaration, and maintain the matter in it, and if but part of it, the replication is bad; and if in debt for £60, the deft. pleaded it was money won at play, the plt. replies not won at play, he ought to add, nor any part of it.

Cro. El. 404.  
—Lutw.  
1402.—2  
Mod. 67, 68.

§ 15. But if the replication be imperfect or defective in the *manner of pleading*, it is aided by a rejoinder, admitting the thing mispleaded, and tenders an issue on another point. Replication to pleas of *duress* and *per minas*, see those heads; so to a plea of non-age, of usury,—to the plea of ease and favour, the plt. may reply, it was to secure his prisoner, and traverse it was for ease and favour.

1 Lev. 195.—  
Barnes, 457.  
—5 Com. D.  
Pl. 2 W. 10,  
19, 20, 22, 23.  
—1 Saund.  
162.—1 Lev.  
254.

§ 16. It is a good replication that meets the plea, and offers as good issue; as if the deft. plead the demandant was under dowable age; she may reply she was nine years and a half old, in dower. So if the tenant plead her husband is alive, it is a good replication he is not. So if he plead *ne unques accouple* in lawful matrimony, it is well to reply, at A she was accoupled in lawful matrimony. So if he plead she eloped, she may reply, she did not elope. So if he plead she had a *jointure*, it is a good replication to say, the estate was not made to such uses.

5 Com. D.  
Pl. 2 G, 8 to  
13.—Co. L.  
33.—1 Bro.  
Ent. 204, 205.  
—Do. 85.—  
Co. Ent. 172,  
180, a.

CH. 180.  
Art. 2.

1 Stra. 458,  
Merrill v.  
Bane.

1 Stra. 493.

8 D. & E. 459,  
Barton & al.  
v. Webb; a  
like case 2  
Johns. R.  
413, 416;  
cited Ch.  
120, a. 6, s. 5;  
a like case  
Ch. 120, a. 3,  
s. 13; Ch.  
169, a. 6, s. 5.  
—1 Bos. & P.  
646; and 2  
Wils. 11.

1 Johns. R.  
516, 517,  
Bindon v.  
Robinson.

1 Ld. Raym.  
241, Hol-  
droid v. Lid-  
del.

2 Caines' R.  
60.

Co. L. 304.—  
1 Bac. Abr.  
118, 119.—1  
Salk. 219.—3  
D. & E. 537.

§ 17. A replication is bad that puts several matters in issue, as in trespass for taking cattle,—not if they form one connected proposition. Willes, 204; 2 W. Bl. 10, 22.

§ 18. Def't. covenanted to transfer stock in three days after request; plea it was made on such a day, and he (def't.) transferred it the next day; plt. may reply, that the def't. did not transfer it on that day.

§ 19. It is a bad replication that makes an immaterial part of the plea parcel of the issue.

§ 20. A replication may be general, where to be particular would introduce prolixity in pleading; as in debt on bond conditioned one A. B. should account for, and pay to the plt's. as treasurers of a charity, such voluntary contributions as he should collect for the use of the charity; def't. pleaded generally performance; plts. replied, that A. B. had received *divers sums*, amounting to a large sum, to wit, £100, from *divers persons*, for *divers voluntary contributions*, for the use of the said charity, which he had not accounted for, or paid over &c. Held, on special demurrer, that this replication was good.

§ 21. As to good and bad replications and rejoinders in Massachusetts Reports, see 1 Mass. Turnpike v. Field; Larned v. Bruce; Otis v. Blake; Dyer v. Stevens; Wolcot v. Knight; Everenden v. Beaumont; Commonwealth v. The Pejepscut Proprietors; Maxim v. Morse; Dwight, admr. v. Clark. Thum v. Farrington, 1 Bos. & P. 610, is decided on the same principle as the next preceding case; def't. was to account for all the monies he received as the plt's. agent.

§ 22. The declaration charged that the def't. dug a certain hole in the street, and did not fill or cover it up, or put a fence round it, to prevent &c., whereby &c.; plea, he did place &c.; the replication was in the words of the declaration, and *hoc paratus* &c. and bad, for the plt. should have taken issue on the def't's. plea,—leave to amend &c.

§ 23. *Rejoinder bad*, as in debt for an escape; plea removal by *habeas corpus*: replication, it was delivered to the def't. *after the escape*; rejoinder it was delivered before the escape is bad.

§ 24. To a plea of judgment recovered, the plt. may reply, and deny the fact, and conclude to the country.

ART. 2. *Duplicity.*

§ 1. This is to be avoided in pleading.

Rule.—A plea in bar that contains a multiplicity of distinct matter to one and the same thing, and to which several answers are required, (admitting each to be good) is bad; but pleas in abatement, and special verdicts, and evidence, may contain double or treble matter; and in all these cases

the deft. may choose one matter and plead it in bar of the pl't's. action, or he may plead the general issue, and then take advantage of all in evidence; or he may plead to one part one plea in bar, and to another part another plea in bar, and the conclusion of his plea shall avoid a doubleness; as the party is barred by one single point, it is unnecessary and vexatious to put him to litigate, and the jury to try any other point; and the party pleading double matter is presumed to know his own strength; and hence, he ought to put his defence on a single point; but what is a single point, see Robinson v. Raily, Ch. 177, a. 5; 1 Salk. 219; 5 Com. 387, E. 2.

Ch. 180.  
Art. 2.

1 Saund. 337,  
note.

§ 2. So to confess and avoid, and to traverse the same point, is double and bad: so is also to plead and demur to the same fact. Though duplicity is a fault, it must be taken advantage of on special demurrer.

4 Bac. Abr.  
119.

§ 3. *Cases in trespass and assault.* Plea, moderate correction as his servant, and a release, bad, though informally pleaded; but had the release been no plea at all, or so pleaded, as to be but surplusage, and no issue could be thereon, then there could be no duplicity. And in false imprisonment; plea, a writ by force of which he took him &c., is good after verdict, but bad on special demurrer as double, and mixing matter of law and matter of fact: so a plea of no award made, nor delivered in writing, is double: so by duress of imprisonment, and by menace of imprisonment, this is double: so in debt *nil debet*, and *nil habuit in tenementis*, is double; but *plene administravit*, and so nothing in his hands, is not double, being only an inference necessarily following from the plea.

1 Wils. 219.—  
4 Bac. Abr.  
120.—2 Ld.  
Raym. 798.

§ 4. If one have divers warranties, and they fall by descent on one person, heir to both, yet he must vouch the heir as heir to one only; for as to the demandant, the voucher is a kind of plea in bar, and he may counterplead the possession of the vouchee, or his ancestors, which cannot be if they be divers; and as to the vouchee, the voucher is a kind of suit, and ought to be single; for the vouchee may counterplead the lien, which may not be if they be divers.

Co. L. 304.

§ 5. But where by law it is necessary for the party to plead two things, it is not double; as in *detinue* by dame Audley. The deft. must plead the marriage of the husband, in order to plead his release. So if three be in execution jointly, at the suit of A, he may plead the escape of all, though the escape of any one will entitle him to his action.

4 Bac. Abr.  
121.

§ 6. To make a declaration, plea, &c. double, the several matters pleaded must be distinct and independent of each other, and one not the consequence of the other; therefore,

3 Wils. 460,  
Bean v.  
Bloom.

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Art. 2.



8 Johns. R.  
327.

4 Bac. Abr.  
120.

Leave to  
amend; 2  
Saund. 48.—  
Lev. 79.—4  
Bac. Abr. 120.

3 Johns. R.  
316, 318,  
Cooper v.  
Heermance.  
—Leave to  
amend, pay-  
ing costs; 2  
Saund. 48.

2 Johns. R.  
433, Currie  
& al. v. Henry.

2 D. & E. 46.  
—Cro. El.  
393.—1 Salk.  
273.—8 D. &  
E. 424.

where it was objected to a declaration, that it was double, because in it, the plt. first claimed a right of common, and second, to cut rushes on the common, in arrest of judgment. The court held, it was not double; for this last right was only a part of the first, or a circumstance of the plt's. right of common: so not double where all the facts make but one defence.

§ 7. This was debt on a single bill of £7, for the payment of 10s. a day, till all was paid. Breach assigned was, that the deft. did not pay on the said several days &c. The deft. pleaded an insufficient plea. Replication &c. The deft. demurred generally. Held, the declaration was double; but that no exception could be taken to it on a general demurrer; bad on a special demurrer. Like principle, 9 Johns. R. 334. This was covenant for rent to be paid at two several days. The breach assigned was, that he did not pay on the said days, held well enough; for perhaps he had paid on neither day; and this case differs from the preceding one; for in that a breach in a single article would entitle the plt. to the whole bill. So debt against an executor, he pleads several judgments against him. The plt. replied to each severally, that it was by fraud. This is clearly double; for by avoiding any one judgment, the plt. should have a general judgment against the executor; yet this pleading is common and good; for if the plt. fail to prove one judgment fraudulent, he may prove another so.

§ 8. The plea was a discharge on the insolvent act; to it the plt. replied, that the deft. had procured a creditor to sign his petition, and to make affidavit for a larger sum than was due to him; that he had concealed a debt due to him, which he did not insert in his inventory; and also that he had been guilty of perjury. On demurrer, this replication was double and bad, as containing three distinct and independent grounds for avoiding the discharge, which would require several distinct points to be put in issue. Several cases cited; and see Ch. 180, a. 10, s. 27.

§ 9. Where a party demurs to a plea because it is double, he must point out in what the duplicity consists. 1 Wils. 219, Ringley v. Parkhurst & al. [What is pleading double in trover, Ch. 178, a. 5, s. 12.] In debt against a sheriff for an escape, not double for him to plead an involuntary escape and a return of the prisoner into custody before any action is brought; and also that the prisoner was discharged by the common pleas, pursuant to the act for the relief of poor debtors with respect to the imprisonment of their persons; for both facts are necessarily blended and make but

one defence; but to plead generally he was discharged out of custody by due course of law, is bad on special demurrer.

Cn. 130.  
Art. 3.

ART. 3. *Pleading double by leave of court.*

§ 1. This double pleading is on the 4th and 5th of Ann, c. 16; and has been allowed in the following cases among others. Not guilty, and the act of limitation; Stra. 889.

Ch. 121, a. 2,  
Da. Costa. v.  
Carteret —  
2 Str. 889.

*Non assumpsit*, and said act; Stra. 678. *Non est factum*, and a discharge under a commission of bankruptcy; 1 Esp. 265; Stra. 871, 1000. Two justifications allowed, as by a lessee, cut the trees to repair, and cut to open a water-

Class v.  
Frost.

course; Stra. 425. Tender and eviction in debt for rent; Stra. 496, Cary v. Jenkins. Not guilty, and of his own wrong; 4 Bac. Abr. 121. *Non est factum*, and never requested to marry; 1 Esp. 266; Stra. 907. In debt for rent, *non demisit*, and *nil habuit in tenementis*; 4 Bac. Abr. 122.

Three pleas pleaded under leave to plead double; 3 Wils. 734. Not guilty, and a general release; 5 Com. D. 380. Not guilty, and justification, damage feasant; 2 Wils. 313, Gates

3 Wils. 20,  
23, 130.

v. Bailey. Not guilty, and right of common; 1 Burr. 318. Not guilty, and monies paid in satisfaction of all trespasses to such a time; 5 Com. D. 378. Also, these, and *son assault demesne idem*: so not guilty and a license: so not guilty

and tender of amends; 2 W. Bl. 1093; Barnes, 366. Not guilty, *son assault demesne* and *molliter manus imposuit*; Barnes, 355. Double plea after general issue waived; 2 Strange, 906, Meard v. Philips. Special justification after the general issue on terms; 1 Wils. 254, Taylor v. Joddrell.

Martin in E.  
v. Common-  
wealth.

*Non est factum* and usury; Lechmere v. Rice, 1 Bos. & P. 12. Not guilty, and took as emblements; 3 Wils. 20. Payment at the day and after the day; Massachusetts Supreme Judicial Court, at Boston, Hancock, adm'r. v. Hancock. Massachusetts Supreme Judicial Court, Portland,

Feb. 1798.

July, 1797, Commonwealth v. Prescott & al., on inquest of office for condition broken. One plea, condition performed: Second, an after act of the legislature waiving the breach of it. Issue on the first; to second, demurrer, on *oyer* of said act. Not guilty as to part of the land and disclaimer as to part, is not pleading double; Massachusetts Supreme Judicial Court, June, 1795, Essex, Fairfield v. Fairfield.

§ 2. *Double pleading not allowed in the following cases*, to wit, *non est factum* in covenant and condition precedent; 2 Esp. 379. *Non est factum* and payment at the day, being incompatible pleas; 1 Esp. 265; 2 W. Bl. 993, Arnold v. Bass; Co. L. 47. Not guilty, and justification; Stra. 876, Palmer v. Wadbroke. *Non assumpsit* and tender; Stra. 949, Baker v. Westbrook; 2 W. Bl. 723. *Qui tam* actions; Stra. 1044, Morgan v. Luckup. Plea and demurrer to the

4 D. & E. 701.  
—2 Wils. 21.

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Art. 3.

Dowgall v.  
Bowman.—  
Fox v.  
Chandler.

8 Johns. R.  
327, 328.—  
See Ch. 194,  
a. 2, s. 13; a.  
5, s. 3.

15 Mass. R.  
48, Jackson  
v. Stetson &  
ux.—See Ch.  
83, s. 33,  
points in this  
case.

same part of a declaration; 4 Bac. Abr. 121. And if the court give leave to plead double, where they have no power, the other party may demur: are confined to the plt's. declaration to be pleaded by the deft.; 121. *Non est factum*, and tender to part; 5 D. & E. 97, Jenkins v. Edwards. *Non assumpsit* to all, and tender to a part; 3 Wils. 145. Not guilty, and justification of a way; 5 Com. D. 380. *Non assumpsit*, and alienage of the plt.; 2 W. Bl. 1326. *Non est factum* and *solvit ad diem*; 2 W. Bl. 905 and 998. Tender of amends and justification, the plt's. fences were out of repair in trespass; 5 Com. D. 331. *Non assumpsit*, and alien enemy; 2 Bos. & P. 72, Thayall v. Young in error; 1 Mass. R. 94. *Nul disseizin*, and that the plt. was never seized *modo et forma* &c.; 6 Mass. R. 6. Debt on judgment in another State, *nul tid record* and *nil debet*; 1 Johns. Cas. 104, Le Conte v. Pendleton. Debt on bond, payment before the day, and payment at the day, first struck out; 2 Johns. Cases, 152, Thayre v. Rogers.

§ 3. Double pleas must be signed by counsel, as the general issue and *plene administravit*; but either alone need not be, the court said: so was the practice of the King's Bench, adopted in New York, in cases in which a different practice has not been established, relied on; 5 Johns. R. 235; 1 Tidd, 621, 622; 2 East, 225.

§ 4. *How far can the deft. plead inconsistent pleas; as not guilty and a justification in slander*, that the words spoken were true. It seems in this case to be held, such pleas are repugnant in general, unless to join them. The court said, under the 4 and 5 Ann, the deft. may plead as many pleas as are necessary for his defence; but the court must judge what pleas are so necessary. I see but one principle in this cause on which the court clearly proceeded; and that was, when one plea is in trial, as the general issue for instance, the plt., court, and jury, may well regard the facts the deft. has confessed in another plea; as for instance, his plea of justification, admitting he uttered the words charged; this reference has been strenuously denied, on the ground each plea is totally distinct and independent. The court cited Learned v. Buffington, which see Ch. 63, a. 8, s. 23; and said, they saw nothing in the case at bar, "to take it out of the general rule, that whatever is confessed or admitted by the parties need not be proved." The deft. cited Lawes on Pleadings, 130; Bac. Abr. pleas &c., K. 5; 1 Chitty on Pleadings, 541, 542; 2 Stra. 1200; 1 Mor. Vade M. 248; 8 Mass. R. 248; 8 D. & E. 150; 5 East, 463; 2 East, 426; 4 Mass. R. 1; and said case of Learned &c. The decision in this case has been opposed by Dunlap, 2 Phil. Evid. 86, 87, at

considerable length, and with some ardor. He cites several of the above cases; also 2 Wils. 300; 2 Johns. R. 437; 2 Mass. R. 543; 5 Bac. Abr. 448. The law of the case, Jackson v. Stetson, has been denied in a Boston paper, by the reviewer of the Massachusetts T. Reports. The decision seems to be reasonable, though the authorities are generally against it, as may be seen in different parts of this work. To examine this point properly requires more room than the plan of this work admits.

CH. 180.  
Art. 4.

ART. 4. *Departure*.—But little need here be added, as this head in pleading has been considered already considerably at large as American Precedents, 12, 21; and Covenant.

3 Com. D.  
331.—1 Mod.  
43, 44, 227,  
289.—2 Mod.  
31, Sams v.  
Dangerfield.

§ 1. A departure is said to be a fault to be taken advantage of only on *special* demurrer, Stra. 22; but otherwise, 4 D. & E. 504.

§ 2. This is a *scire facias* against bail; plea *no capeas ad satisfaciendum* against the principal; replication, one issued and returned *non est inventus*; rejoinder did not lay four days in the office of the sheriff: on demurrer, held, this rejoinder was a *departure* from the plea, as that denied any *ca. ad. sa.* issued; this admitted one did; 1 D. & E. 334; 4 D. & E. 364; 2 Esp. 57, 71; 12 Mod. 92.

1 Wils. 334,  
Elliot v. Lane.

§ 3. *Rule*. *Departure* in pleading is where the second plea contains matter not in pursuance of the former plea, and which does not fortify the former; but it is no *departure* to plead what the party could not shew at first; but it is a *departure* to plead in one manner and fortify in another; as to declare at *common law*, and reply a *special custom or statute*; 3 Salk. 123; *decessus* is going off to new matter.

4 Bac. 123,  
123.

§ 4. *Cases*. The deft. pleads a descent from his father, and gives colour; plt. replies a feoffment from the deft.; the deft. rejoins the feoffment was on condition, and that the condition was broken: the rejoinder is a *departure* from the bar.

Doct. Pl. 120.

§ 5. So if one plead a gift *in tail*, and rejoins a *recovery in value*, here is a *departure*; but one who pleads a *feoffment* in bar may rejoin a release to his feoffor; for this fortifies the bar.

Co. Lit. 304.

§ 6. Plea, award; rejoinder no award is a *departure*. So is a plea *not damnified*, and rejoinder *of his own wrong*. 3 Salk. 123.

But plea, a statute; replication, is repealed; rejoinder, is revived, is good; for the rejoinder fortifies the plea,—the first matter. So plea, account; rejoinder, was robbed, is good; for shewing he was robbed, is accounting. Plea no award; replication shewing an award and a breach; rejoinder stating it was void for want of mutual releases &c., the rejoinder is a *departure*; for no award, means none at all.

Lev 81.—

Lev. 85.

§ 7. So a plea *non damificatus*,—rejoinder *ready to pay*, is a *departure*. 4 Bac. Abr. 124.

4 Bac. Abr.  
124.

## CH. 180.

## Art. 4.

Salk. 228 — 3  
Wils. 20, 23.  
2 Wils. 304.  
—Saund. 117.  
—Salk. 222,  
Webb v. Palmer;  
Primer  
v. Phillips.

Matthews'  
case, 10  
Mod. 349.

2 Wils. 8,  
Long v.  
Jackson  
1 Salk. 221.

Willes, 1038,  
Ellis, v.  
Bowles.

2 Ld Raym.  
1419. White  
v. Clever.

3 Salk. 141,  
Galle v. Betts.

1 Stra. 422.

Willes, 25,  
Cossins v.  
Cossins.

Cro. El. 168,  
Smith, v. Hil-  
lier.—1 Lev.  
110.  
1 Maule &  
Sel. R. 395.

§ 8. Trespass; plea *damage feasant*, replication a *conversion*; the replication is no departure; for it fortifies the trespass by making the deft. a trespasser *ab initio*. Plea he *saved harmless*; replication shewing a *damnificatus*: rejoinder, no notice thereof, is a departure. If the declaration lays a day, and the plea justifies as to that day, the plt. may reply another day, and it is no departure, the day not being material; for to make a departure, there must be a varying in the replication from something *material* in the declaration. 3 Dyer, 253, Cole v. Hawkins; 1 Stra. 21.

§ 9. Declaration states one day on parol promises; plea the statute of limitations; replication, another day, is no departure. 2 Stra. 806; 1 Stra. 21.

§ 10. It is no departure to rejoin new matter that fortifies the plea, and explains it.

§ 11. If the deft. plead *performance*, and rejoins matter of excuse, it is a departure.

§ 12. So where the deft. justified taking cattle *damage feasant*,—and rejoined they were taken, surcharging the common, this is a *departure*.

§ 13. The deft. in his plea insisted on a *performance* of a condition, but in his rejoinder he *excused the non performance*; this is a departure. Upon a bond conditioned to execute an office singly, without the plt's. aid, if the deft. plead he did execute it singly, he cannot rejoin the plt. for a time prevented his executing it singly.

§ 14. Debt on a bond to pay £40. so long as the deft. should enjoy a certain office, by quarterly payments every year; plea that the office was granted to three for their lives, and that he enjoyed it as long as they lived, and so long he paid the said rent quarterly; replication, had enjoyed it longer, and had not paid the money by quarterly payments: on demurrer, it was objected this was double; but held not double, for the deft. in his rejoinder cannot tender an issue on payment of the money, as that would be a departure from his plea.

§ 15. After infancy pleaded it is a departure to rejoin an account stated.

§ 16. Debt on bond,—def't. to let his intended wife spend £50 out of his personal estate; def't. pleaded he did not prevent her &c.; replication, did prevent &c.; rejoinder, he had no personal estate &c. is a departure.

§ 17. If the day in the declaration be material, as in an action on a bond, bill, note, &c. the plt. in his replication cannot vary from it without a *departure*.

§ 18. On demurrer, held, that where the deft. pleaded that A recovered judgment against A. Wells, as executrix, def't.

for £199, claimed to be *due to him* from the testator; rejoinder, that the judgment was confessed to A for that sum, *for his own debt, and as trustee for the debts of many other creditors*, the rejoinder was a departure from the plea. A was a mere stranger to the estate of the testator *quoad* all but £9; and though it be proper for an executor to have power to confess judgment, it can be only to each creditor of the estate; the plea is *quoad* a debt to A, and the rejoinder *quoad* a debt to many persons. Plea no award, rejoinder confessing and avoiding one, is a departure.

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ART. 6.

2 Caines' R.  
320.

ART. 5. *Repugnant pleas.*

§ 1. These pleas are inconsistent, and always to be avoided; but the plea is good if the matter that makes the repugnancy be rejected as *surplusage*.

§ 2. Debt on bond for £100; the condition recites a debt of £50, and adds, if the debtor do *not* pay said £50, the bond to be void; judgment for the plt. to the plea, the deft. did *not* pay; for when the condition recites a debt, and then lays an obligation not to pay, it is *repugnant*.

5 Com. D.  
509.—2 Salk.  
463, Wells's  
case.

§ 3. It is *repugnant* to plead not guilty as to the force, assaulting and beating, and to justify an arrest under process; for the not guilty denies the assault and battery, and the deft. by justifying the taking or arrest, confesses it.

3 Salk. 218.

§ 4. Covenant; breach assigned that the apprentice *durante tempore quo* served, departed; this is repugnant: judgment for the deft. on demurrer; for it should be *durante tempore quo servire debuit*.

Salk. 213.  
Nevil v. So-  
per.

§ 5. Proviso &c. repugnant to the grant &c.; see *Proviso and Habendum &c.*

ART. 6. *Argumentative pleas.*

§ 1. Rule is, that every plea ought to be direct, and not by way of *argument* or *rehearsal*; nor is it sufficient that what ought to be expressly pleaded, may be deduced by argument from what is pleaded.

Co. L. 303.

§ 2. Cases, debt on bond to warrant land; plea that the plt. peaceably enjoyed &c., is ill, being only *argumentative*; for he should have pleaded he did warrant the lands and *non-damificatus*. So if the deft. in trespass for carrying away goods, plead the plt. never had any goods; this is *argumentative* that the deft. is not guilty.

4 Bac. 97,  
Dyer, 43,  
case of  
Grenelife.

§ 3. In *formedon in reverter*, the demandant counted on a gift to *baron and feme in tail*, and that they are dead without issue; plea that the gift was to them *in fee*, without traversing the gift in tail: this held ill, being only *argumentative*, that the gift was not *in tail*; this should have been directly denied. So in trespass against divers defts.; plea that one is *dead*,—replication, he is *alive*, is ill, without saying he is

4 Bac. Abr.  
97.

CH. 180. not dead, being only by way of argument that he is alive;  
 Art. 7. but an *argumentative* plea is only *form*.—American Precedents, 12; and see Intendment; and bad only on special demurrer.

9 Johns. R. Argumentative plea is good on general demurrer; certainty  
 314, 319. to a common intent is sufficient to a special plea; and this certainty is what, on a fair and reasonable construction, may be called certainty without recurring to possible facts.

Coleman 76. § 4. *Fivolous pleas*; see *Fivolous Demurrer*. If a deft.  
 —Id. 81. put in a demurrer clearly frivolous, the court will not allow him to withdraw it, and plead issuably, though he swears to merits of which he was ignorant when he put in such demurrer; but if pleas be not manifestly bad on the face of them, the court will hold the party to his demurrer.

3 Caines' R. A motion to overrule a frivolous plea, and to enter a default as if no plea filed, has the same preference as motions on frivolous demurrers.  
 377.

3 Johns. R. Leave to plead on condition the deft. pleads issuably, he  
 259, 260, Davis v. Gran- pleads the general issue, also another plea in abatement (in  
 ger.—Id. 541. the form of one in bar); this is frivolous; not complying with the condition, the second plea vitiated the first.

See Sham And when a plea is put in the plt. views as frivolous, he  
 Plea, Ch. 180, may enter a default for want of a plea or demurrer.  
 a. 12.

1 Caines' R. § 5. *Feigned issue*; see Ch. 56, a. 3. s. 3; right to duties  
 487, Dea v. tried on one from the Court of Chancery, and an inquest is  
 Fen. improperly taken; relief must be sought in the court where the inquest is taken; and an inquest taken at the circuit without due notice given, will be set aside, with costs to be paid by the plt's. attorney.

3 Johns. R. § 6. A *feigned issue* was formed in order to try if a contract  
 139, 140. was usurious, on which a judgment had been entered up by warrant of attorney on a bond, and execution stayed until after the trial. So the court directed a feigned issue to try the question, if a bond was forged, King v. Shaw; the warrant of attorney was given in the vacation to enter up judgment in vacation or term, on a bond given at the same time, and payable immediately.

#### ART. 7. *Negative pregnant.*

Co. L. 126, § 1. On this no issue can be taken, as it implies an affirmative; and an affirmative that implies a negative; as where 303.—4 Bac.  
 Abr. 98. the deft. pleads, he did not give by deed, this implies a gift by parol; and therefore, the issue ought to be that he did not give in manner and form.

5 Bac. Abr. 98. § 2. This negative pregnant is ill on a special demurrer.  
 —Doct. Pl. After issue joined, the deft. pleads a release since the last  
 256. continuance. The plt. replies, that it is not his deed since the last continuance. This is a negative pregnant; for it im-

plies it was his deed, though not executed since the last continuance.

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Art. 7.

§ 3. In debt for rent on a lease. The deft. pleaded, the plt. had nothing in the tenements at the time of the demise. The plt. replied, he had in the tenements, without shewing what estate he had, though this had been bad on demurrer; for by not shewing what estate he had, it is pregnant of this negative, that he had not such an estate by which he had power to demise; yet after verdict it is good, the truth thereby appearing that he had such an estate.

Cro. Jam.  
313, Gill v.  
Glass.

§ 4. Trespass for entering the plt's. house. Plea, that the daughter licensed him to enter, whereby he entered. Replication, that he did not enter by her license; this is a negative pregnant, and rather confesses the license than denies it; but on motion in arrest of judgment, held, the issue was cured by the verdict.

Cro. Jam. 87,  
Mynner Cole.

Case against an innkeeper; for that the plt's. goods were embezzled by his fault. Plea, that they were not lost by his fault; this is a *negative pregnant*. He should have pleaded the special matter. So to say he did not accept the obligation in satisfaction, implies it was given in satisfaction, and is a *negative pregnant*. But *quære*, as the material part is, is the acceptance in satisfaction.

4 Bac. Abr. 98.  
Stile, 309.

§ 5. So case for burning the plt's. house, by negligently keeping the deft's. fire. Plea, the house was not burnt by negligently keeping his fire; this is a *negative pregnant*. So in trespass, if the issue be, that the deft. did not disseize the plt., to the use of W.; this is a *negative pregnant*. But had he pleaded, that he did not disseize in manner and form, the plea had been good: so, if tenant for life plead, he has not aliened *in fee*, it implies he has aliened in tail, which is a forfeiture of his estate: so if an executor rejoin as to several judgments, that they are not kept on foot by fraud, it implies some of them are kept on foot by fraud; so a *negative pregnant*. So if the deft. plead, the cattle died in pound *overt* by default of the plt., and the plt. replies, they did not die by his default generally, this is a good plea; but if he say they did not die in the pound *overt*, this is a *negative pregnant*.

4 Bac.  
98, 99.—  
Doct. Pl.  
256, 257.

§ 6. This was a *mandamus*, to which it was returned, among other things, "that the corporation was not duly assembled to proceed to the election of a recorder;" this is a *negative pregnant*; for, as Judge Buller said, "this means they were duly assembled for some other purpose, but not for the purpose of electing a recorder; but that mode of pleading cannot be supported."

5 E. & E. 66,  
76, Rex v.  
Mayor & al.  
of York.

§ 7. In waste against the lessee for years, if the deft.

5 Com. D. Pl.  
R. 6.

CH. 180. plead, he did not lease for years, this is bad; for it is a *negative pregnant*, as it implies he did lease.  
 Art. 3.

§ 8. But there is another rule, that is, if the matter implied be not sufficient, it is not a *negative pregnant*; as in debt on a retainer in husbandry, if the deft. plead, he did not retain him in husbandry, it is not *pregnant*; for a retainer generally, is not sufficient to maintain his count: so if the issue be tendered to the point of the action, it is not bad, though it be a *negative pregnant*; as in an action on the Statute R. 2. Plea, that he did not enter *contra formam statuti*, is good, though a *negative pregnant*. So in an action on any statute. plea, that he did not do *contra formam statuti*, is good: so in debt on a bond to stand to an award, so that it be delivered to the parties &c.; plea, that no award was made and delivered to the parties, is a good plea, though it is a *negative pregnant*; for it is pursuant to the condition, which is entire.

Co. L. 281 —  
 Hob. 72 —  
 Bul. N P. 200.  
 —9 Co. 112  
 —2 Cro. 136.  
 —Hob. 82,  
 209.

§ 9. *Modo et forma*. It is sufficient to prove the substance of the issue. This rule depends on knowing how far the words, *modo et forma*, used in joining issue, are of the substance of it; for where they are so, they must be proved. Where issue is joined on the point of the action, there *modo et forma*, are mere form, and need not be proved; as Pope v. Skinner, Hob 72, where the date of a lease pleaded in replevin, was not material, as the question was, if the plt. had such a lease, by force of which he might use the common. Its date was not essential; but a lease from another person would have been.

Co. L. 202.

§ 10. But where a collateral point in pleading is traversed, then *modo et forma* is of the substance of the issue, and must be proved; as if a feoffment be pleaded as made by two, and this is traversed *modo et forma*, and a feoffment of one is found, here *modo et forma* is material: so if pleaded by deed, this is traversed, a deed must be proved.

#### ART. 3. *Surplusage*.

4 Bac. Abr. 94.  
 —Cro. Jam.  
 549, Hall v.  
 Bonythan.

§ 1. This branch has been considered, American Precedents, 12th chapter, in part; and may be further pursued here to advantage. The first question is, What is *surplusage*?  
 2. What is the effect of it? The general rule is, *utile per inutile non vitiatur*; as in debt on bond, the deft. pleaded, he paid £50 the 14th day of June &c., according to the condition. Replication, he did not pay £50 the aforesaid 14th day of August &c., which, at the same day he ought to have paid; and *hoc paratus*. Verdict found he did not pay the said 14th day of June, as the deft. alleged. Held, good, and the word *August* is but *surplusage*.

8 Mod. 327.  
 Rex v. Harris.

§ 2. This was an indictment for an assault, &c. on a petty

constable. Held, the word *petty* was insensible, and *surplusage*; and when it was stricken out, a good indictment was left.

CH. 180.  
Art. 8.

§ 3. So mistaking the deft's. for the plt's. name is *surplusage*, after verdict; and what may be struck out on motion, may be *surplusage*; if a right of action be left. 1 Phil. Evid. 166, *Bristow v. Wright*.

3 Wils. 43.—  
Doug. 667.

§ 4. So to state an exception in a statute when not necessary, is *surplusage*.

1 D. & E. 322,  
Rex v. Hall.

§ 5. If the cause of action be added in the condition of a bail bond, it may be rejected as *surplusage*.

6 D. & E.  
702, Owen  
v. Nail.

§ 6. The words, *administrator of B*, when not necessary, may be rejected as *surplusage*.

5 Com. D. Pl.  
612.—8 Hob.  
Brown v.  
Dunning.

§ 7. So if the verdict find the prescription good, which is alleged, it is well, though it finds more; the last part is *surplusage*. But if the verdict contain matter not in issue, as woundig &c.; and gives damages for the whole, it is bad; for here the surplus matter found, cannot be distinguished, and damages given for it.

5 Com. D.  
Pl. S 28, 29.—  
3 East, 115,  
Spyve v.  
Topham.

§ 8. A wrong name inserted in the premises in a release of an estate, rejected as *surplusage*, being inconsistent with the rest of the deed.

§ 9. But words can never be rejected as *surplusage*, when the allegation is sensible and consistent in the place where it occurs, and not repugnant to antecedent matter, though laid under a *videlicet*, and however inconsistent with an allegation subsequent.

5 East, 244  
to 260, Rex  
v. Stevens.  
—1 Bos. &  
P. 281.

§ 10. Where new matter is introduced by *inuendo* without any antecedent *colloquium* to which it can refer to support it, it is not necessary to sustain the action, it may be rejected as *surplusage*.

9 East, 93,  
Roberts & al.  
v. Camden.

§ 11. One *indebitatus assumpsit* and *quantum meruit* for meats &c., was well laid; another for goods sold, and no value laid, and so bad. The verdict gave entire damages by reason of the premises. Motion in arrest of judgment. The court supposed all the damages given for the first *assumpsit* well laid, and rejected the other as *surplusage*. *Quære*, and another case seems to have been decided otherwise. 12 Mod. 131, *Molton v. Prince*.

12 Mod. 127,  
West v. Cole.

§ 12. *Surplusage* does not vitiate where it may be rejected, and leave a good declaration, information, or indictment, and thereby it so appears; as in debt on a foreign judgment, and the declaration concludes, as appears by the record; this is *surplusage*; and so it appears on the face of the original declaration; and other cases; 2 W. Bl. 1101.

Doug. 4,  
Walker v.  
Whittier.

§ 13. If a plt. name himself executor or administrator

Doug. 4,  
Crowford v.  
Whittal.

CH. 180. when the action is in his own right, it is but *surplusage*; and  
Art. 8. 1 Vent. 119; Hob. 203.

2 Mass. R. § 14. The plt. declared upon a promissory note, payable  
282. Tucker by instalment, and two instalments had elapsed; and that  
v. Randall. the whole sum of the note was due; this last allegation was  
rejected as *surplusage*, and judgment given for the two instal-  
ments.

Buller N. P. § 15. Matter of *surplusage* unnecessarily alleged, need  
167, Hill v. not be proved; as where in an action on a policy of insur-  
Hollester.— ance, it was averred in the declaration, the parties agreed to  
2 Johns. Ca. refer, and that without the plt.'s fault, it had not been refer-  
52, Allaire v. red. No proof the plt. had ever named a reference or re-  
Ouland. ferree; therefore, it was objected, he had not proved his  
declaration; but held, it was no part of the contract, but a  
collateral agreement; hence, not necessary to be stated to  
entitle the plt. to his action; hence, not necessary to be  
proved. It will be observed, the cases differ on this point;  
or rather it is difficult to see what is *surplusage*, and may  
be rejected as such, and what words are sensible in their  
place, and have a bearing on the case, and so cannot be  
rejected without making it a different case.

Saund. 282, § 16. It is one rule, that *surplusage* does not vitiate, unless  
Doppa v. it be contrary to the matter before pleaded, and in something  
Mayo.—4 material, though repugnancy in a material point is not cured  
Bac. Abr. 94. by verdict; yet if it be on a different part of the declara-  
tion, or if the plt. release such repugnant part, judgment shall  
be for him.

4 Bac. Abr. 94. § 17. If an annuity &c. be granted for life, or years &c.,  
the reversion may be granted without attornment; therefore,  
to plead it, is *surplusage*; for the case is good without it;  
and as the case is stated, the court can see the attornment  
stated is unnecessary.

Cro. Jam. 282, § 18. In avowry for rent charge, the deft. made title to J.  
Bowles v. S., with whom he married in the year 1603, and became due  
Poor. at M. 1597, £20, and in arrear, and not paid to him and his  
wife; avowed Hill. T. 7 James. Held good; for saying it  
was in arrear to him and his wife, was but *surplusage*, when  
the contrary appeared to the court, he not then being mar-  
ried as appeared by his plea; therefore, the court saw that  
striking out the words relating to him, would not materially  
alter the case, or make it different from what it was before;  
and so in fact these words had no material bearing on the  
case, and so it appeared on the record.

2 Fearnie on § 19. Many words in themselves may be *surplusage*, as execu-  
Exr. Devises, tors, administrators, in a gift of *personal* estate; yet the use of  
264, 265. them may materially explain a party's meaning.

§ 20. If arbitrators join with an umpire in an award, it is but *surplusage*, and the award is good, and may be declared upon as his *umpirage*. 1 W. Bl. 463, *Southby v. Hodgson*. CH. 180.  
Art. 8.

§ 21. *Surplusage* does not prejudice; as if the deft. in replevin avows as bailiff to A, *administrator of D*, where A ought to distrain in his own right, the words *administrator of D*, may be rejected as *surplusage*.

§ 22. The court may order surplus counts to be stricken out, as three out of seven, in a declaration on a policy of insurance, were ordered to be struck out as *surplusage*, and *unnecessary*,—they being only repetitions of three other counts, stating the signature to have been by an agent of the deft., and the three former counts having alleged the signature to be by the deft. himself, but no costs given. 2 Burr. 1188,  
Nicholson v.  
Croft.

§ 23. In debt on a bond of indemnity against the maintenance of J. S., his wife, and children, it was a good breach that two justices made an order to pay 2s. for the maintenance of I. S., one of the children of J. S., his wife, and children. An additional averment that part of the 2s. was for the maintenance of I. S. is *surplusage*; and a traverse of such averment is immaterial; and no traverse is good which does not reduce the point in debate to a conclusion. 1 Ld. Raym.  
41, Waltham  
v. Sparks.

§ 24. In this action a *promissory* note payable in *chattels*, was declared upon, as *under the statute*; and the breach assigned was, that the deft. did not pay the money mentioned in the note &c. It was held, after verdict, that the reference to the statute might be rejected as *surplusage*, and the defect in assigning the breach, was aided by the verdict; so that the court would intend a sufficient breach was proved; as the jury would not have given damages if a good breach had not been shown. 7 Johns. R.  
461, 462,  
Thomas v.  
Roosa.—1  
Saund. 32.—  
Jones, 125.

§ 25. With regard to words to be rejected as *surplusage* in declarations, informations, indictments, or any pleadings, there are several other rules to be observed: as First, that after the surplus words are stricken out, there is no authority whatever for amending the parts that remain: Hence, second rule is invariably that the parts that remain not stricken out, must constitute a good declaration, information, indictment, plea, replication, &c. &c.: Third rule, it must appear in the whole pleadings in the case, that it will remain substantially the same after the words be stricken out, or rejected, or so considered, as before; because every party pleading has a right to plead in his own way; and when he has formed his declaration &c. he calls on the deft. to answer to that declaration, and that only; to this, and this only, the deft. comes prepared to answer; then if the rejection of some words makes an alteration any way material, the deft. is of a sudden, and by surprise, called on to answer a new charge.

Ch. 180.  
Art. 9.

§ 26. Fourth. The original declaration, information, indictment, or plea, &c. must be such, as, upon the face of it, the court and parties may see it will remain substantially the same after altered as before, to be proved substantially by the same evidence, and the alteration to be made must be such as not to vary the issue.

§ 27. Fifth. Such alteration is materially different from an amendment, which may always be allowed on known terms, and according to statutes and rules of practice concerning amendments.

12 Mod. 102,  
105.

A day laid after the verdict is no day at all, and *surplusage*; and *no time* is well, after verdict. 5 Com. D. 331, 386, 387, 388, several cases.

2 Ld. Raym.  
1015, Crosse  
v. Bilson.

§ 28. Deft. pleaded in bar, and demurred to the replication, and concluded his demurrer, and "wherefore, as before, he prays judgment, and that *the declaration may be quashed*,"—the words "and that *the declaration may be quashed*," are *surplusage*, and the demurrer is a demurrer in bar.

Gillb. P. C.  
132, Law's  
Pleading, 64.

§ 29. Two maxims of law apply to *surplusage*: 1. *Susplusage non nocet*: 2. *Utile per inutile non vitiatur*. And *surplusage* is cause of special demurrer: 1. When grammatically wrong: 2. Absurd in sense, or when no sense at all can be given to it: 3. If it shew the plt. has no cause of action, or deft. defence: 4. If repugnant to what is before alleged.

1 Penning,  
272, Smith v.  
Voorhees &  
al.—1 Id. 6.

§ 30. Words *overseers of the poor* are *surplusage*, and rejected when they sue &c.; for not being a corporation, they cannot sue as such, but when, for money paid, the overseers sue, such addition is as above.

ART. 9. *Substance, form.*

American  
Precedents  
11, 12, many  
cases; Ch.  
120, a. 2, r. 1  
to 22; many  
cases, Ch.  
137, a. 6, s.  
4 &c.—7 Inst.  
Cl. Pref.—1  
Ld. Raym.  
369.—4 Bac.  
135.—3 Mod.  
235.—Sav.  
87, 88.—7  
Inst. Cl. 113.  
—2 Wils. 5.—  
1 Mod. 166.—  
1 Mod. 441.  
—1 Mod. 122.  
—1 Mass. R.  
459.

§ 1. There is no question in the whole system of pleadings that occurs oftener than the question, What is *substance*? What is *form*? What is *material*? What is *not material*? Want of *substance* may be taken advantage of on a *general* demurrer; but want of *form* only on a *special* demurrer, pointing out the very defect in form. The 4th and 5th of Anne has made some material distinctions in this respect; by this act, the following matters are *form* to be taken advantage of only on *special* demurrer, to wit: an immaterial traverse; want of *proferts* of bond, bill, indenture, or other deed; want of *vi et armis, contra pacem*—*hoc est paratus verificare*, or *hoc est paratus verificare per recordum*: next by the books, or adjudged cases, to wit: *duplicity, negative pregnant*, and *argumentative plea*, 7 Inst. Cl. 164; want of *defence*, 7 Inst. Cl. 216; 1 Lutw. 7; 3 Salk. 271; want of *colour*, 5 Bac. 205; not shewing *how saved harmless*. Strange, 681; an *immaterial traverse*, Strange, 694; want of a *traverse*, 3 Inst. Cl. 325; special plea amounting to the *general issue*, 10 Co. 94;

*performance generally of negative and affirmative covenants*, CH. 180. Cro. El. 232; 4 Bac. Abr. 134—(otherwise of disjunctive); *several breaches in debt on bond to perform covenants*, 134; *informal issues*, see such issues (not immaterial ones), Hob. 233; *not shewing how cousin and heir*, Hob. 232; *want of inducement to a traverse*, 236; *informal conclusion of a plea or replication*, 321; *departure*, according to some books, not others, 1 Stra. 22; 4 D. & E. 504; 5 Com. D. 425, 428, omitting to state the consideration of a bargain and sale, 2 H. El. 261, Bolton's case; not shewing the judgment sued is in force, 3 Mod. 235; *not guilty in assumpsit*, so good after verdict, Marsham v. Gibbs, 2 Stra. 1022.

*Variance in form &c. does not vitiate; assumpsit for monies paid to the deft's. use, inhabitant of Newtown.* The declaration stated an execution issued against them for taxes on which property was taken, for which the plt. receipted, and was obliged to pay the taxes. At the trial a receipt was given in evidence, stating it was taken on an execution against the collector. Held, the variance was not material, as it was proved the execution was in fact against the town.

§ 2. Here also may be added the clause in the United States' laws on this point, providing "that no summons, writ, declaration, return, process, judgment, or other proceedings in civil causes, in any of the courts of the United States, shall be abated, arrested, quashed, or reversed, for any defect or want of form; but the said courts, respectively, shall proceed and give judgment according as the right of the cause and matter in law shall appear unto them, without regarding any imperfections, defects, or want of form in such writ," &c. except those specially pointed out by demurrer; and all defects in form the court may amend.

*What substance—not form.* This distinction is found to be diffused throughout all kinds of pleadings, and all sorts of instruments. It is constantly seen in the application of demurrers, general and special; in verdicts aiding, or not, defects; in amendments allowable, or not, in the application of the statutes of amendments, jeofail; in defects cured, or not, by the pleas of the opposite party; to make a table of all the defects in substance and in form, found in the books, would require volumes, only a few leading cases of course can be collected in this article; also, see causes of demurrer, head Demurrer.

§ 3. Defects in substance; a defective title (not a good title defectively stated); an immaterial issue; omitting to state a special request where necessary what can be supplied only by the party's information.

Debt on bond, *nil debet* pleaded is bad in substance, and so

3 Day's Ca.  
159, Beers v.  
Bolsford & al.

Act Sept. 29,  
1789, s. 32.

5 Co. 35.—18  
El. 27; El. 5.

2 Wils. 10.

CH. 180. on a *general demurrer*, though urged it was only a *jeofail*, and  
 Art. 10. but *form*.

3 Day's Ca. § 4. To *build or finish* a ship is in substance variant, as the  
 312, Smith v. declaration stated the deft. undertook in consideration of the  
 Barker. plt's. contract, to *build* a ship; evidence was of one to *finish* a  
 ship partly built, and to sell it to the deft. Held, this vari-  
 ance was a matter of substance, and fatal.

4 Day's Ca. § 5. *Qui tam* for taking usury; the declaration stated it was  
 37, Drake v. on a loan of \$200 by means of a note; the proof was of for-  
 Watson. bearing the sum due on the note \$200, and of the interest ac-  
 crued for more than six months. Held, a material variance, and  
 fatal; the declaration and evidence varied in substance.

4 Day's Ca. § 6. So *qui tam* for usury, the declaration stated a loan by  
 114, Wilmot the deft. to A for sixty-three days, and proved a note exe-  
 v. Monson. cuted by A and B jointly and severally, payable to the deft.  
 in sixty days. Held, the variance was in substance, and fatal.  
 Ch. 177, a. 9. s. 60.

9 Johns. R. § 7. The place of holding the court in the county, is not  
 42. material, or substance,—as where alleged to be held at *Salem*,  
 in the county of Washington, August, 1807, &c.; in the  
 record produced, the place or town where held was not men-  
 tioned. Held, the variance was immaterial; the place of  
 holding &c. being fixed by law, it must be known to have  
 been at *Salem*.

#### ART. 10. *Traverse*.

Co. L. 282, § 1. This usually consists of two parts: 1st, The induce-  
 283.—Hob. ment: 2. The traverse proper, or denial. As where the  
 103.—Salk. deft. pleads infancy, the plt. replies, and traverses thus;  
 628.—Dyer, *precludi non* &c., because he says, the said D, at the time of  
 365.—Saund. executing the writing obligatory aforesaid, was of full age of  
 22.—1 twenty-one years; without this, that the said D, at the time  
 Saund. 43, of making the said writing, was within the age of twenty-  
 Salmon v. one years, as he has alleged. 5 Ins. Cl. 215. To omit the  
 Smith; but inducement is but form; and so an immaterial traverse is  
*quære*.—1 but form, as a. 9; and a traverse must be so offered that the  
 Saund. 209, other party may meet it without a departure. As where the  
 a. 8. declaration stated a lease of three rooms; plea, a lease of  
 four rooms, and an entry into the fourth by the plt.; this is  
 ill; for the deft. should have pleaded a lease of four rooms,  
 and traversed the lease of three rooms; for the plt. could  
 not traverse the lease of four rooms without a departure, as  
 he had declared on a lease of three.

Farr. R. 104, § 2. *Conclusion*. Trespass against two for taking a pail  
 Haywood v. of water out of the plt's. well. The deft. pleaded in abate-  
 Davis. ment, that the plt. and the other deft. were tenants in com-  
 mon of the well. The plt. replied, he was sole seized; *ab-*  
*sque hoc*, he was tenant in common with any, and concluded

to the country. Rule laid down, where the *absque hoc* takes in the whole matter of the plea, conclusion may be to the country; but where the *absque hoc* is on a particular fact, or a special point, which does not comprehend the whole matter of the plea, the conclusion must be with an averment. In case of *absque tali causa*, (when that is proper) may conclude to the country; for in fact, *absque tali causa* answers the whole matter; and a replication may be good that does not traverse a particular point in many cases. Traverse means to deny.

CH. 180.  
Art. 10.

Dougl. 95,  
Boyes v.  
Whitaker.

§ 3. A traverse properly taken, closes the issue, and it denies some material point alleged in the pleadings; and it is general or special. General, is *absque tali causa*, the inducement to which is, that the deft. did the wrong the plt. complains of, *de injuria sua propria*: Special, is where some particular fact, or special matter, or point of title only, is denied or traversed. The general traverse is good, 1st, Where the deft. excuses a tort, as his assault: 2. Where the deft. in trespass, justifies under a public statute giving a right to all persons: 3. Where the deft. justifies at common law.

4 Bac. Abr. 67.  
—5 Bac. Abr.  
205, 206 —  
Salk. 268,  
Chance v.  
Weeden.

§ 4. Rule—where matter is expressly affirmed by one party and denied by the other, it need not be traversed because a sufficient issue is joined; as in *audita querela*. A bond to pay money at a day and place declared on. Plea, the deft. was there and tendered the money, and that the plt. was not there to receive it. Plt (creditor) pleaded, that such a day he was there and demanded it, and that neither the deft. (debtor,) nor any one for him, was there to pay; *absque hoc*, the deft. tendered. Held, this traverse was unnecessary.

Cro. El. 754,  
Huish v.  
Phillips.

§ 5. Matter of law connected with matter of fact, is traversable, but not a matter of law alone; rather, a matter of right resulting from facts is traversable.

2 Saund. 23,  
a. 5.—2 W.  
Bl. 776.—2  
Mod. 55.

§ 6. But the last rule must be understood of those cases where the denial makes an apt and complete issue, on an affirmative and negative; as where the plea is, that B is dead, and the replication is, that he is alive, there must be traverse that he is dead.

Vent. 213.—4  
Bac. Abr. 67.

§ 7. It is another rule, that the inducement ought to be sufficient in matter traversable and issuable; but it seems it need not be alleged with so much precision and certainty, as the matter after the *absque hoc*. In the inducement the party sets up a title for himself, and particularly specifies his case, and justifies, and then denies the matter alleged by the other party; or denies it to be true, in the manner and form the other party avers it.

Cro. Car. 336,  
Dike v. Ricks.  
—Salk. 628.—  
Dyer, 365.—  
Like's case,  
Hob. 103.—  
Doct. Pl. 344.

## CH. 180.

## Art. 10.

3 Mod. 320.—  
3 Lev. 40.—  
Ld. Ray. 64.—1  
Bac. Abr. 320.  
—Cro. El. 30,  
Hering v.  
Blacklow.

§ 8. Another rule is—a traverse ought not to be taken but when the thing traversed is issuable, as the intention of it is to come to a good issue; and the traverse, too, must be to a single point, however made up of several facts, and of a matter alleged by the other party. If the deft's. plea be special, and contrary to the matter in the plt's. declaration, such plea must traverse such matter; as if the deft. plead a *prescription*, he must traverse the plt's. *prescription*; and in this case, the court said, the rule is, if the deft. allege *seizin* in one from whom he claims, and the plt. alleges *seizin* in another from whom he claims, before the *seizin* stated by the deft., the plt. must traverse or avoid the *seizin* laid by the deft.

Salk. 91, Hud-  
son v. Jones.

§ 9. Another rule is—that whatever is traversable and not traversed, is admitted. But where a man confesses and avoids, he need not traverse: must not traverse. *Yelv. 173.*

Salk. 138,  
Coleman v.  
Sherwin.

§ 10. Any material part of the declaration or defence, is traversable; as in trespass, plea, *seizin* in J. S., who demised to the deft.; the plt. may traverse the *seizin* or demise; and if the plt. assign several breaches, the deft. may traverse any of them, or severally.

4 Bac. Abr. 68.  
—3 Mod 203,  
anonymous.

§ 11. Another rule—if the traverse be not an apt one, judgment will be arrested; as in assault and battery. plea a release. Replication, by duress. Rejoinder, shewing it was not by duress, but was voluntary. Plt. surrejoins, it was by duress; *absque hoc*, it was voluntary; and *hoc ponit*. Issue thereon, and verdict for the plt.; and judgment arrested; for the rejoinder should have been, *not by duress*.

4 Bac. Abr. 69.

§ 12. If the deft's. plea be in the negative, the plt. need not traverse it; for a negative cannot be traversed; as plea, no assets *ultra*. Replication, assets *ultra*, and good without saying what.

2 Lutw. 1632.  
—Stra. 837.—  
3 Salk. 353.

§ 13. Another rule—where one confesses and avoids, he need not traverse; but if he do, it is mere form; as where plea was, A was seized and leased to the deft. Replication said, true, A was seized, and so leased to the deft.; but before that lease he leased to the plt. Held, the plt. should not traverse.

5 Bac. Abr.  
207.

§ 14. If the deft. insist on one title, and the plt. on another. not inconsistent with the deft's. title, there a traverse is not necessary.

4 Bac Abr 69.  
—Dyer, 212.—  
Cro El 780.—  
Haw. P. C.  
142.—Raym.  
406.

§ 15. *Second head.* A traverse allowed or not. Generally a record or an officer's return, is not traversable; as on *scire facias*, the sheriff returned J. J. *tertenant*, this is not traversable; nor is his return of a *rescous* traversable; nor is a justice's record of a forcible detainer; for he acts as a

judge; nor is a coroner's inquisition on a view of a dead body; nor is the probate of a will traversable. CH. 180.  
Art. 10.

§ 16. A fact or seizin implied may be traversed; as where in replevin, A was seized of two-thirds of the land, as tenant in common, and the deft. justified that A, his master, was seized, A shall be intended sole seized; and his sole seizin may be traversed, though only implied or intended. 2 Salk. 629,  
630, Gilbert  
v. Parker.

§ 17. *A virtute cujus* is not traversable, as it is not a positive allegation, but only a deduction or inference from another matter; as where two *habeas corpora* were pleaded, and both of different teste and returns. Replication, he was brought up by virtue of the first writ. Held, as above. So by pretence of which, by force of which, *per quod*, &c. are not traversable for the same reasons. Nor a conclusion. 3 Salk. 352,  
Beals v.  
Simpson.—1  
Saund. 23, n.  
5.

§ 18. Where a power is given to hear and determine, the matter is not traversable. 12 Mod. 388.

§ 19. A traverse must not be too narrow nor too broad. 3 Salk. 357.  
1 Wils. 338,  
Griffith v.  
Williams.  
1 Saund. 268, n. 1; 312, d. n. 5; 82, n. 8; 260, n. 2.; 2 Saund. 207, a. n. 24. And there must be colourable title set forth in the inducement to the traverse. The deft. in trespass justified under a prescriptive right to a duty called *tensary*, and a prescriptive right to distrain for it. Plt. traversed the right to the duty, but not that to distrain for it; and held, the traverse was right.

§ 20. On pleading a seizin generally, a traverse may be taken, that he is sole seized, as seizin generally implies so much. A replication must not confess, and avoid, and traverse too. 2 Salk. 630,  
Gilbert v.  
Parker.  
Yelv. 151, 221.

§ 21. *Third head. Where a traverse is necessary or not.* The rule is—where the matter pleaded by one party is contrary to the matter pleaded by the other, there generally ought to be a traverse of the latter; as in Hering's case above, the deft. pleaded seizin in A, under whom he claimed, and the plt. alleged seizin in B, under whom he claimed, he must traverse, or confess and avoid A's seizin. So, a plea, A died seized in fee; replication, he died seized in tail; plt. must traverse he died seized in fee. And if the deft. plead, J. S. is executor, he must traverse he himself is. So of a bailiff, administrator, &c. Lutch. 381—  
Cro El. 30.—  
4 Bac. Abr.  
70, 71.

§ 22. So in escape against a gaoler, he may plead the gaol was broken by the king's enemies, or suddenly burnt by fire; but must also say *absque hoc*, that the escape was in another manner, or as the plt. hath alleged. Dyer, 66,  
Mynours v.  
Turke.

§ 23. Debt against the marshal, for that he suffered one D., in execution for £202 damages, to go at large where she Cro.Jam.657,  
Whiting v.  
Reynel.

CH. 180.  
Art. 10.



would, the plt's. debt not being satisfied, whereby an action accrued. Plea, that she broke prison and escaped, and he freshly followed her and took her again on —, in fresh suit, and had her in execution, and yet hath her. Plt. demurred, and the court held it no plea; for the action is brought, and implies a voluntary permission to go at large, which the deft. has neither denied nor traversed; and if the marshal voluntarily let a prisoner at large, he cannot retake him. Also held, the wife in execution is the sole debtor. This case, however, has been questioned; and it may be doubted if the action implied a voluntary permission &c.; and if not, then such was not to be traversed.

Lutch. 381 —  
4 Bac. Abr. 71.

§ 24. This was debt by the gentlemen ushers for a fee of £5. The declaration stated, that time out of mind they used to receive £5 of each one who voluntarily and without compulsion received the honour of knighthood &c. Plea, he took it in sole obedience to the king. Demurrer and judgment for the plts.; for the deft. ought to have traversed the voluntary acceptance; for it was of the very essence of the action. So account against one as bailiff of land such a year, it is a good plea to say, another was bailiff that year; but then the deft. must traverse or deny that he himself was bailiff. So in trespass, plea, that B enfeoffed the deft. Replication, that B enfeoffed the plt.; the plt. must traverse, that B enfeoffed the deft.

3 Salk. 352,  
Benson's  
case.

§ 25. This was debt on a sheriff's bond for appearance, dated November 20, 9 W. &c. Plea, first delivered, November 30. Held, that the deft. when he pleaded the bond was first delivered November 30, should have traversed that he delivered it on the 20th of November; for here the date is material.

2 Leon. 16.—4  
Bac. Abr. 72.

§ 26. Where the deft's. prescription ought to be traversed as in trespass for pulling down the plt's. hurdles in his close. Plea, that B was lord of the manor, and that he and his ancestors had a sheep path through the same &c.; and that the tenant thereof could not erect hurdles there without the lord's leave, and that said B let to the deft. the said manor; and because the plt. erected hurdles there, without leave, he threw them down, as was lawful for him to do. Replication, of his own wrong, and without such cause. Held, the replication was ill; for the plt. ought to have traversed the deft's. prescription.

2 Leon. 15.—4  
Bac. Abr. 72.

§ 27. Trespass for chasing his ewes big with lamb so that thereby he lost his lambs. Plea, *damage feasant*, and he drove them to pound. Plea ill, for the deft. should have traversed the special matter under the *per quod*; for though he might drive them to pound, he ought to drive them with-

out prejudice. A traverse may be taken to any number of facts, if they all make but one point. But not to distinct points. 3 Johns. R. 115, 118; see Ch. 180, a. 2; 3 Caines' R. 160, Strong & al. v. Smith. CH. 180.  
Art. 10.

§ 28. *Fourth head. Traverse upon a traverse.*—Rule is, there never can be a *traverse upon a traverse*, where a proper and apt one is taken; for then the issue is closed, and a further traverse is idle. So if an apt traverse is offered by one party, the other cannot leave it and offer another on another point; for when a proper and apt traverse is once taken or offered, there the pleadings must close; for if after this a party can go further, pleadings might be endless; but where the first traverse is not on the best point, apt or proper, then no doubt the other party may go further, and come to this point. Cro. Car. 109.  
—1 Saund.  
20 to 23.

§ 29. Hobart allows a *traverse on a traverse*, and cites a case in waste for felling and selling trees, against the lessee. He pleaded he fell them, but used them in repairing the house. *Absque hoc*, he sold them. The plt. need not join issue on this point or traverse, but may reply he let them rot, or the like; *absque hoc*, that he employed them in repairs. Though this is a *traverse upon a traverse*, it is good,—for the first traverse was *immaterial*; as it was not material whether he sold them or not. The material question was, whether he employed them in repairs, as he stated in his *inducement*. Hob. 104.

§ 30. So, Hobart, 104, in trespass *quare clausum fregit*, on a certain day. If the deft. plead a *release*, he shall traverse all trespasses *after*; if a *feoffment*, all *before*; if a *license*, all *before* and *after*. In these cases the plt. may leave the deft's. traverse, and traverse the point of the justification, to wit, the *release*, the *feoffment*, or *license*; and this is a *traverse after a traverse*.

§ 31. Trespass for false imprisonment in *London*; plea the deft. recovered against the plt. in debt, in *another county*, and on a *capeas ad satisfaciendum* imprisoned him,—*absque hoc*, that he is guilty in *London*. Replication, that he imprisoned him in *London*, as &c.—*absque hoc*, that there is any such record, and this he is ready to verify by that record &c.; deft. demurred. The court held the replication good; for otherwise every deft. by a false plea might draw a transitory action into what place he would, and might make the place and day alleged material, which the law will not allow; but will rather suffer the plt. to traverse such false plea without maintaining his action. Cro. El. 418,  
Paramoor v.  
Varrold.

§ 32. *Traverse after an apt one not allowed*, as in trespass; the deft. pleaded he entered by the command of J. S. Replication, that J. S. was seized in fee, and leased to the plt. at Cro. Car. 336.  
—1 Saund.  
22, 23.

CH. 180. will, and *traversed the command*. Rejoinder maintaining the  
 Art. 10. plea that J. S. commanded and *traversed the lease at will*.

4 Bac. Abr  
 74.—1 Saund.  
 20, 21, 22.

This was held ill, for it was a *traverse after an apt traverse*.

§ 33. Debt on a bond conditioned to appear on a bill returnable on a Sunday. Plea, he was arrested on a bill returnable a Friday. Replication, on a bill returnable on a Sunday, and not a Friday. Rejoinder, on a bill returnable on a Friday and not on a Sunday. Held good, for Friday is not material; the true point, was it returnable on a Sunday?

Carth. 99,  
 100.

This was an action on a promise to marry the plt. or pay £20; the deft. pleaded he offered himself, and the plt. refused; *absque hoc*, he refused before the plt. refused. Replication, the plt. tendered herself &c.; *absque hoc*, the deft. offered himself &c. Deft. demurred to this replication, for it made a *traverse upon a traverse*. Held, the traverse in bar was ill, for it made the time of the offering part of the issue: so not an apt traverse.

4 D. & E. 437,  
 Mayor & al.  
 of Oxford v.  
 Richardson;  
 and 1 Saund.  
 22, n. 3.

§ 34. This was trespass for fishing in the plts'. free fishery, also their several fishery in Oxford Haven. Plea that Oxford Haven from time immemorial hath been, and is, an arm of the sea, where every subject &c. hath the liberty of free fishing. Replication, that the corporation of Oxford are a corporation by prescription &c. and have the exclusive liberty of dredging and fishing for oysters in said place &c. *without this, that every subject has a right of free fishing &c.* Rejoinder, that the place &c. hath been immemorially an arm of the sea, in which every subject has the right of free fishing, and *traversing the plts'. prescriptive right*. Plts. demurred, because they in their replication traversed *an issuable and material point of the defts'. plea, and therein tendered the defts. a material issue*; but they did not take issue thereon, but passed by and traversed another part of the plts. replication, and thereby attempted to put in issue a matter alleged by the plts. by way of *inducement &c. &c.* Demurrer held good; for there cannot be a *traverse on a traverse* when the first is *material*, and will decide the whole question.

But reversed  
 in the ex-  
 chequer  
 chamber, 2  
 H. Bl. 182.

Moor, 870.—  
 Hob. 104,  
 Digby v.  
 Filzherbert.  
 Cro. Car. 105.  
 —1 Saund.  
 22, n. 4.

§ 35. If the traverse be not to the *substance and point* of the action, the other party may pass it, and tender another traverse or demur specially for that cause; 1 Saund. 22, n. 3.

§ 36. In some few cases a traverse may be taken after a former *apt traverse*; as where in a *transitory action* laid in such a county, there is a special *local justification* with a *traverse* of the county, the plt. may either traverse the special justification, or at his election join in the defts'. traverse.

3 Day's Ca.  
 231, Fowler  
 & al. v. Clark.

*The inducement of the traverse not admitted &c.* Facts stated by way of *inducement* to a *material traverse*, are not *traversable*; of course a party by joining issue on the facts tra-

versed, does not admit the truth of the inducement, he has opportunity to traverse the facts in it, as he must thus join issue. CH. 180.  
Art. 10.

§ 37. *Fifth head. To what point the traverse shall be taken.*—*Prescription.* This was trespass for breaking and entering the plt's. close, called Swanwick Delves, and digging stones &c. Plea that there are certain waste commons lying open to one another,—one called Swanwick Delves, the close in which &c., and the other called Swanwick Green. The deft. prescribed for a right to dig stones in these closes for repairs &c., and that he did dig &c. The replication traversed only the prescription in Swanwick Delves; the rejoinder tendered an issue on the prescription both in Swanwick Delves and Swanwick Green. Special demurrer; because the rejoinder did not tender an issue only on the fact traversed in the replication. *Curia*, the rejoinder is right; for the deft's. plea connects the two closes, and his prescription covers the whole; and as a prescription is entire, and supposes a grant, the deft. must prove the whole as laid, or fail. 4 D. & E.  
157, More-  
wood v.  
Wood.

*Lord Kenyon*—If an action be brought for a trespass in a particular close, the deft. may plead it as a part of a larger close, and that he has a right over the whole. If the deft. was not allowed to plead his right over both closes, he could not be permitted to give evidence of acts in Swanwick Green: cannot be taken of a matter not alleged. 1 L. Raym. 121.

*Ashhurst J.*—When a prescription is pleaded, the other party cannot deny a part only, but must either demur or traverse the whole. The jury must give a general verdict for the whole prescription one way or the other.

*Buller and Gross, Js.*—A party must plead a grant as made; and a prescription is only a plea that supposes a grant made and lost.

Where prescription is pleaded in justification, it must be specially traversed, and not by the general words *de injuria sua propria absque tali causa*. Hob. 76.

§ 38. This was *assumpsit*. Plea the plt. was an alien enemy, born at Roan, in France, under the allegiance of &c. Replication, born at Hamburgh, under the allegiance of the emperor &c., friend of the king &c., and traversed he was born at Roan, in France. Replication and demurrer held ill; for the traverse makes Roan a part of the issue, and that is immaterial: the plt. should have traversed he was born under the allegiance of the king of France. 3 Salk. 28,  
Progers v.  
Arthur.—19  
Johns. R. 69.

§ 39. *In trover* the conversion is traversable, for it is the substance of the action, and the tort supposed; and if there Cro. El. 97,  
Stransham's  
case.

CH. 180. be no conversion, no action lies: as in trover; plea he took the goods *damage feasant*, and impounded them; *absque hoc*, that he converted them to his use.

2 Saund. 5,  
Millor v.  
Walker.—  
6 Co. 24.—  
Vaugh. 3.—  
Saund 21,  
22. and n. 2,  
Bennet v.  
Filkins.

§ 40. *Rule.* A traverse must be taken to some material point alleged by the adverse party, which if found for him who takes it, absolutely destroys the adverse party's right, by shewing he has none in manner and form, as he has alleged; and a traverse that sufficiently answers the material point of the declaration is good; and if the deft's. traverse leaves no title in the plt., it is good, whatever becomes of the deft's.; and a party cannot pass by a *material* traverse tendered.

Lutch. 935.

§ 41. *Another rule is*—a traverse must be of matter alleged; hence ill, in false imprisonment, where the deft. justified by process out of an inferior court. Replication, the cause of action arose out of its jurisdiction—*absque hoc*, it accrued within it; bad, as it is of matter not alleged.

Stile, 344,  
Wood v.  
Holland.—4  
Bac. Abr. 76,  
77.—6 Co 24.  
Jam. 681.—  
1 Saund. 22,  
n. 3.

§ 42. *Another rule*—if two points be material, party may traverse either, if it end the cause, as in ejectment. Plea that the plt. *disseized* B of the land, and then leased it to him, and afterwards it *descended* to the plt. Replication, the plt. was seized, and traversed the *disseizin* on B. Demurrer, because he did not traverse the *descent*. Held, traverse was good, and material, and might be of the *disseizin* or *descent*. And so if a party claim under several feoffments, one to him from C, one to C from B, and one to B from A, either may be traversed.

Dyer, 121.—  
Cro. El. 168,  
Kimmersley  
v. Cooper.—  
1 Saund 207,  
n. 5—3 Salk.  
357.

§ 43. *Another rule*—where by the *inducement* to the action the deft. is *ousted* of his law, there he may as well traverse it as the gist of the action; and where the conveyance to the action is that which doth entitle the plt. to his action, it may traversed; as in an action for words, the declaration states, that the mayor &c. of London had used to take depositions *in perpetuam* &c.; and that the plt. had *been sworn before him* &c.; and then the words spoken by the deft., to wit, that the plt. on said oath had sworn falsely. The deft's. plea was, that the plt. *had not been sworn before the said mayor &c.* in manner and form as he had alleged: demurrer; for that the traverse cannot be taken, for the alleging of the oath is but *conveyance to the action*, and so not traversable: but traverse held good, and the above rule was laid down.

Cro. Jam.  
234, Dalby v.  
Cook.

§ 44. So “assumpsit supposing that such a day (4th James) on an account between them, the deft. was found in arrear such a sum, and assumed to pay it. The deft. pleaded that such a day (4th James) they accounted, and then he was found in arrear such a sum as the plt. supposed; and that the same day the deft. made an obligation to the plt. for pay-

ment thereof, and traversed that any other day after the obligation made, they accounted together *prout* &c., and thereon demurred, for that the account which is the cause of the action is not traversable, nor the time, for it is but *inducement* and *conveyance* to the action; but the court held that the account which was the ground of the action, was well traversable." Judgment for the deft.

CH. 180.  
Art. 10.

§ 45. *Another rule* is—a consideration executed is incorporated into the promise, and is not traversable; but a consideration executory is traversable. Held, "if a promise be executory, as in consideration you will serve me a year, I will give you £10; here you cannot bring your action till the service be performed;" and in the action you shall lay the promise as it was, and make special averment of the service done after. Now if the promise was made and the service not done, the deft. must traverse the performance of the service, and not the promise; for they are distinct in fact, though they must concur to the bearing of the action.

Cro. El. 201,  
Smith v.  
Hitchcock.  
—Hob. 106.

§ 46. *Another rule*—if the deft. may justify at the place alleged in the declaration, he shall not traverse the place laid in the declaration. But otherwise, if the justification be local; as in trespass, for that at E. in the city of C., he killed the plt's. dog. The deft. justified killing him in a warren at D, in the same county; *absque hoc*, that he is guilty at E., as the plt. alleged. Demurrer; 1st, because he traverses the place only, and not all other places: and 2. for the matter of justification. All the court held the traverse good, when the cause of justification is local, and that he need not allege any more than that place.

Cro. Jam. 44,  
Wadhurst v.  
Dammie.—1  
Saund. 22.—  
1 Wils. 81.

§ 47. *Another traverse*. Justification under a sheriff's warrant in Norfolk; *absque hoc*, he is guilty in London, or elsewhere out of the city of Norfolk, aforesaid. Demurrer, for that the deft. had justified and also traversed. *Curia*, it is right; for the justification is in another county, and the county where &c. ought to be traversed; and the plt. may maintain his action and issue, or traverse the deft's. plea. A sheriff may justify at any place in his county &c.


Cro. Jam.  
372, Bateman  
v. Woodcock.

§ 48. *Another rule*—if you vary the time in the declaration, and make it material, you ought to traverse the time stated in the declaration; as in case on several promises, the statute of composition of two-thirds was pleaded in bar, but the plt. shew the contract to have been after the time of the statute, which the deft. did not traverse in his plea, as he ought to have done. Judgment for the plt.

7 Mod. 16,  
Beverly v.  
Pim.

§ 49. *Another rule*—mere matter of supposal; matter alleged out of due time; matter immaterially alleged, are not traversable; nor matter of intendment; nor cause of suspi-

Salk. 628.—  
Ld. Ray. 349.

CH. 180. cion. Case against a sheriff for taking insufficient bail, intending to deceive him; the intendment is not traversable; Art. 10. but however what is necessarily understood, intended, or implied, may be traversed, as well as if expressed. 1  Bac.Abr.81. Saund. 312, d. n. 4; 2 Saund. 10, n. 14.

§ 50. *Another rule*—The deft. cannot traverse in mitigation of damages, but must help himself in evidence; and the traverse must be to the point of the action; as in covenant for rent for seven years behind, the deft. cannot traverse two of these years being behind, but must plead covenants performed. So matters under the *ita quod*, in aggravation of damages, need not be traversed.

*Another rule*—the traverse must not blend matter to be tried by the record and matter to be tried *per pais*; therefore, where the deft. traversed that the plt. recovered at a court held before the mayor and bailiffs, according to custom; held, ill on demurrer; for he traversed matter of record not traversable *per pais*, and custom to be tried *per pais*, and joining it with matter of record; but he ought to have pleaded, no such record, or no such custom.

Lev. 283.

§ 51. *Another rule*—the traverse may be good and the inducement bad; as in debt on a sheriff's bond, plea it was made for ease and favour. Replication, it was made to secure his own debt; *absque hoc*, that it was made for ease and favour. Judgment for the deft.; for though the traverse was good, yet the inducement was ill, for not saying it was for a true debt. This case shews the inducement must be good as well as the traverse, or the party taking it is not entitled to judgment.

2 Saund. 5,  
Millor v.  
Walker.—1  
Saund. 207,  
n. 5, 347.

§ 52. *Another rule is*—a traverse need not be where there is an averment; the trespass justified is the same as that the plt. complains of, though at another time; and if a traverse be added in such case, it is informal and bad, on special demurrer; as is a traverse after a sufficient confession and avoidance. Reasons, 1 Saund. 209, n. 8.

1 Saund.340.  
Millor v.  
Spateman.

§ 53. If the plea admit the trespass, and state a justification, that is a legal bar to the action, if the fact be true, and concludes that the trespass justified is the same as that alleged in the declaration, a traverse is improper and superfluous.

2 Lut. 1457,  
Hargrave v.  
Ward.—2  
Saund. 6, a.

§ 54. As where in trespass *clausum fregit*, laid November 10, and the deft. justified November 11, with an averment of its being the same trespass. Held, the plea was good without a traverse; and the addition of it being specially demurred to, made the plea bad; and many other cases to this effect, cited by Williams; 2 Saunders, 5, a, b, c, &c.; as Vastenope v. Tayler, 1 Buls. 138; Tyler v. Wall, Cro. Car.

238; Allen v. Chamming, Sir T. Jones, 146; Stra. 694, Courtney v. Satchwell; 1 Saund. 14, Hawe v. Planner. CH. 180. Art. 10.

§ 55. And according to several authorities, if the deft. justifies on the same day laid in the declaration, he need not aver the case justified and that stated in the declaration, are the same, though otherwise, if he justifies on a different day. So as to place; but it is added that this distinction is of but little use, since it is settled "that the day and place in the declaration in such actions (for torts) was not material; or the plea when properly drawn will follow the day in the declaration; but if it should vary from it, so that there is an apparent difference on the record, between the trespass in the declaration and that which is justified, the distinction will take place, and the plea must conclude with such an averment." But now not usual to add in a plea of license or *son assault*; but is usual in trespass for taking goods, though the plea follows the day in the declaration. Same as to place, where the justification is not local. In fact, if the day or place in the justification be not material as to time or place, those in the declaration must be followed in the plea, or it will be bad on a special demurrer; and the rule is the same in actions on the case; *assumpsit* on parol promises, and in many other transitory actions. As in trover of six oxen in London, plea, seized them as waifs in D. in Essex, and traverse the deft. was guilty in London. Held bad, because the plea did not contain any local matter to make the place material, and amounted to the general issue.

§ 56. But notwithstanding the statutes 16 and 17 Car. 2, c. 8, and 4 and 5 of Anne, c. 16, s. 6, doing away all distinctions as to venue in transitory actions; yet it may be safest to follow the old forms, and traverse the place where material; as in trespass laid at Hereford, in the county of Hereford, for taking the plt's. cattle, and driving them away, and converting them to his use. Plea, not guilty as to the conversion; and as to the taking and driving away, justified as bailiff of the manor of A, and that such proceedings were had in the Manor Court; that a *distringas* issued, directed to the deft., who by virtue thereof distrained the plt's. cattle, to enforce his appearance at the Manor Court, and concluded, which is the same trespass, without traversing the place laid in the declaration. Held, on special demurrer, that the plea without a traverse, was no answer to the trespass at Hereford. Cited Cro. El. 705, holding a traverse in such case necessary. Two judges held it bad in substance. All bad in form. According to these cases, and many others, if the justification be local, and at another place than that stated

2 Saund. 50, b. n.3; 295, n.2.

1 Saund. 85, Wright v. Barracot.—Cro. El. 174, Bullock v. Smith.

CH. 150. in the declaration, then the deft. ought to traverse that in the  
Art. 10. declaration.

§ 57. A traverse may be of a precise allegation, though  
2 Saund. 206, not necessary to have been made; as where the plt. alleges  
a. n. 21, n. 22; more than he need do; as where the deft. granted to the plt.  
207, a. n. 24. a thousand trees in a certain wood, to be felled in three

In Goram v.  
Swating, 2  
Saund. 206, a.  
n. 21.

years, and when the plt. had cut some of them the deft. in  
consideration the plt. would fell no more till after the three  
years, engaged he should fell the remainder after the three  
years. Plt. averred, that at the time of the promise he had  
felled but eight hundred; and assigned the breach, that the  
def. hindered him from felling the residue after the three  
years. The deft. pleaded, that before said supposed prom-  
ise, the plt. had felled a thousand trees; without this, that at  
the time of the promise he had felled eight hundred trees  
only &c. On demurrer, it was held that the traverse was  
good; for the plt. by alleging the felling of eight hundred  
trees only in his declaration, which was a matter issuable,  
had given an advantage to the deft. to traverse in the manner  
he had done; and this rule is laid down, "for every matter  
of fact alleged by the plt. may be traversed by the deft.,  
and the deft. by way of traverse may answer the matter al-  
leged in the same words as the plt. has alleged them." But  
the party may not traverse an immaterial allegation; and an  
immaterial traverse may be specially demurred to.

2 Saund 207,  
b. n. 5.—1  
Saund. 14, n.  
2.

2 Salk. 629,  
White v.  
Bodinam.

§ 58. *Absque hoc*, that he ousted him of the premises, goes  
to every part; and in trespass and avowry, if a freehold be  
pleaded, it must be traversed. 3 Salk. 354. Plea, the  
def. is an executor, must traverse the dying intestate. 1  
Salk. 207.

2 Salk. 627,  
Young v.  
Ruddle.

§ 59. In *assumpsit* the deft. may plead a gift and accep-  
tance in satisfaction of the promises. Under such a plea the  
plt. may protest against the gift, and traverse the acceptance.  
And 5 Mod. 86; and 12 Mod. 85, same case.

1 Stra. 444,  
Watkins v.  
Parry.

§ 60. In case of a bail bond, the arrest of the principal  
is not traversable. Matter in law is not traversable. Yelv.  
199.

2 Johns. Ca.  
293, Renou-  
ard v. Noble.

§ 61. In an action on *scire facias* against bail, the deft.  
pleaded that another person of the same name and descrip-  
tion, became bail, and traversed he was the person named in  
the bail piece; and the plea was held good.

2 Johns. R.  
423, Snyder  
& al. v. Croy.  
—3 Wils. 304.

§ 62. Where a traverse in pleading comprises the whole  
matter generally, it may conclude to the country as well as  
where it comprises the other party's whole prescription &c.,  
as in the common traverse, *absque tali causa*. Leave to  
amend &c.

Willes, 475.

§ 63. An avowry is not traversable, being only as a sug-

gestion to have a return; and if traversed the deft. may demur, and is not bound to take judgment by *nil dicit*, or as for no answer.

CH. 180.  
Art. 11.

§ 64. In traversing, it is usual to conclude in manner and form as he, the deft., has in his plea &c. alleged; but these "words only put in issue the substantial statement of the manner of the fact traversed, and do not extend to the time, place, or other circumstances attending it, if they were not originally material and necessary to be proved as laid."

Law's Pleadings, 120.

§ 65. If a traverse be unnecessarily or impertinently made, advantage can be taken of it, but on special demurrer. As in covenant for rent, the deft. pleads eviction, a traverse he enjoyed the land, after the eviction, is impertinent, and must be, however, specially demurred to; but to a plea of eviction, one may reply an entry by virtue of a power, and traverse the eviction.

1 Ld. Raym. 369, Bushell v. Lukmore.

§ 66. Trespass for breaking and entering the plt's. house and carrying away goods. The point settled in this case is, that when the plt. in replying confesses and avoids the material facts of the plea in bar, he ought to conclude *hoc paratus* &c., and not traverse; and so leave the pleadings open to the deft. to answer the facts alleged, to avoid his plea. The plea, justified entering the plt's. house under process to arrest one Chase in it. Replication was, that he was a lodger in it, and was new material matter.

13 Mass. R. 520, Oystead v. Shed & al.

ART. 11. *Proferts*. This article has been considered at some length in American Precedents, Ch. 13; and will be further pursued here.

§ 1. An award, a policy of insurance, a justice's warrant, or a sheriff's warrant, is no deed, and need not be shewn; and so if under seal, if not a deed, as a composition with creditors. One in the possession of land by execution need not shew the deeds; for he has them not; he is in adversely. So things executed as a license or lease expired, need not be shewn, nor a warrant to collect taxes; Co. 38.

Stile, 459.—3 Lev. 205.—2 Cro. 372.—5 Com. D. 461. 5 Co. 74.—Cro. J. 402, Walker v. Bellamee.

§ 2. But if there be a release of a right to *tenant for life*, or in *tail*, he in *reversion* or *remainder*, who pleads it, must shew it; or if it be to him in reversion or remainder, and tenant for life pleads, he must shew it.

Lit. S. 452, 453, 473.—Co. Lit. 225.—5 Com. D. 461

§ 3. If a deed be essential by law to the title, it must be shewn, though nothing is conveyed by it; as if one plead *attornment by a corporation* to a grant to him in reversion, he must shew the deed of attornment, though he claims nothing from those who attorned, which is only consent; otherwise if the deed under which he claims nothing, be only *ex provisione homines*. And where a party claims a part, he must make a *profert*; as where Leyfield sued in an action of tres-

6 Co 38, 39, Bellamy's case —10 Co. 88 to 96, case of Leyfield.—1 Saund. 189, n. 2.

CH. 180.  
Art. 11.

pass for corn and hay carried away. The plea in bar was, that queen Elizabeth was seized in fee in right of her crown, and by her letters patent, one demised to A *for his life*, who on — demised to B for eight years, if A lived so long, and the deft. as a servant of B, took the corn and hay as tithes &c. The plt. demurred, because (among other things) the deft. did not shew said letters. Judgment against him in the K. B.; though B, in whose right he justified, had but a part of the estate. On error in the Exchequer Chamber, many cases were stated to shew he need not shew them. But it was resolved, he must shew them, and that B, the lessee for years, was bound to shew them, though made to A, lessee for life; “for it is a maxim in law, that if he who is a party or privy in estate or interest, or he who justifies in the right of him who is party or privy, pleads a deed; though he who is privy claims but a parcel of the original estate, yet he ought to shew the original deed to the court.” Here B claimed not part of the land, but part of the estate, to wit, eight years part of a life estate granted to A.

1 Mor. E.  
142 to 170.  
10 Co. 93.

§ 4. If one will prove any fact in issue by deed, it must be shewn, except where lost, or where one has it not, or claims nothing under it.

Co. Lit. 126.

§ 5. If the deed belong to the party pleading it, he must shew it, though he come to the estate by act of law.

10 Co. 93, 94,  
in Leyfield's  
case.—1  
Saund. 9, n.  
1.—1 Chitty  
on Pleadings,  
348, 357, 400,  
415.

§ 6. But a deed pleaded need not be produced in several cases, as if he who pleads it be a stranger to the deed, and claims nothing out of it, nor justifies as servant to one who is party or privy, as if he comes in not by the party to the deed, but by act of law, and so cannot provide for having the deed; for “there is another maxim in law, that where a man is a stranger to a deed, and doth neither claim the thing comprised in the grant, nor any thing out of it, nor doth any thing in the right of the grantee, as bailiff or servant, then he shall plead the patent or deed without shewing it.”

Cro. Jam. 70,  
Dagg's case.

§ 7. So where there were letters patent to A for life, and he leased to the plt. for years, and he did not shew them, and held well; for he has but *parcel* of the estate: 2. These letters do not belong to him: 3. This action is to punish a *tort*, and not to demand the interest: and 4. The title shewn in the declaration is but *inducement* to the action. The two last reasons materially differ this case from that of Leyfield's above mentioned. (So if one has not the possession of the deed.)

1 Saund. 9,  
n. 1.

5 Com. D.  
462.

§ 8. So when A covenants to stand seized to the use of B, one who claims under B need not shew the deed; for B is in by law, that is, by the statute of uses.

§ 9. So it is not necessary to shew a deed in the case of a conveyance operating under the statute of uses. 1 Saund. 9, n. 1; 3 D. & E. 156, Read v. Brookman. CH. 180. Art. 11.

§ 10. So "though the statute of frauds requires that livery shall be accompanied by an instrument in writing, then the party is not bound to make a *profert* of the deed, though it is necessary in evidence to shew it, or something in lieu of it." 3 D. & E. 156, —2 H. Bl. 262.—Dyer 277.—Cro. Jam. 217.

§ 11. So in stating a conveyance, it was alleged that a deed was cancelled by the seal of the releasor being taken off, and destroyed; and that part of the deed was destroyed or lost with the *profert* of the residue, and it was holden to be good pleading. Omitting to state a consideration in a bargain and sale, is bad only on special demurrer—*quare*. 2 H. Bl. 259, 264, Bolton v. Carlisle.—4 Cruise, 370.

§ 12. So one not party or privy to a deed need not shew if the estate be executed; as if he plead a mortgage and payment at the day, he need not shew the deed; for the condition being performed, the deed may be delivered up; but otherwise, if a party or privy; nor need the deed be shewn if kept by the other party, or destroyed by him, nor if lodged in court; 5 Com. D. 464. Co. L. 226.—5 Com. D. 463.—Willes, 560.—Co. L. 227, 228.—Co. L. 226.—5 Co. 75.

§ 13. If a man plead a deed by way of discharge, no *profert* is necessary, as if a corporation avow for rent and services, and in bar thereto the plt. pleads a lease of the land made to A, who leased to the plt., he need not shew the deed; for it is pleaded by way of discharge, and he does not claim title by it. Willes, 689.—5 Com. D. 465.

§ 14. If the deed produced be the same in substance as the one declared on, it is sufficient; as a bond to pay the plt. or his attorney, is the same in substance, or as if the deed omit the *anno domini*. Salk. 658, Holman v. Borough.

§ 15. No *profert* of the assignment of a bail bond is necessary: for it is not a deed; nor is it necessary to state the witnesses' names. Bul. N. P. 169.—1 Wils. 180, Lease v. Box.

§ 16. The court on argument, allowed a count on a deed, with a *profert*, to be struck out, and a new count to be filed, stating a deed lost by time and accident, with a *profert* of a copy. Several cases have since occurred, in which this rule has not been questioned,—how parties &c. must be known and named; 10 East, 55. Mass. S. Jud. Court, June, 1794, Ivers v. Hooper & al.

§ 17. A neglect to make a *profert* in curia, where necessary, is fatal upon a general demurrer, but otherwise by the 4th and 5th of Anne; see article 9; only *form*, and cannot be taken advantage of after verdict. Salisbury v. Williams, 1 Saund. 9, n. 1. Salk. 519, Peirce v. Paxton.—2 Salk. 497.

§ 18. If a *profert* be made, nothing but the production of the deed will be sufficient. 4 East, 585, Smith v. Woodward.

CH. 180. And it is error, if it appear by the record, that the deft. had *oyer* of a copy only; leave to amend an inadvertent *profert*. 1 Wils. 16; 3 D. & E. 153, n. *Matteson v. Atkinson*.

Art. 13. § 19. Where there is an assignment of all debts with a power of attorney to receive and compound for the same, and to submit them to arbitration, and the assignee, on an arbitration, has a sum awarded to be paid to him, it is not necessary in an action on the promises, in consequence of the non-payment of such sum, that the assignee in stating the assignment, should make a *profert* of the same in his declaration, and no *profert* need be made of a deed that is only *inducement* to the action.

§ 20. And where a *profert* is had, and *oyer* regular, the whole deed is to be set out, and if mis-recited, the other party may help himself by signing judgment for want of a plea, or he may by his replication, pray the deed may be enrolled, and procure it to be truly enrolled,—demur or take it as truly enrolled.

§ 21. Though a *profert* is made of a deed it is no part of the record if *oyer* be not prayed of it—*profert* of a copy of a lost deed, Ch. 82, a. 3, s. 11.

ART. 12. *Sham pleas*, or false or deceitful pleas.

§ 1. If a party plead one of these knowingly, it is a great abuse of justice, and the court may punish the pleader at discretion; and if false, of the pleader's own shewing, it is cause of demurrer; as if a pleader bring an indenture into court, and plead it contains no covenants, and on inspection, it is found to contain covenants.

§ 2. If a client would have his attorney plead a false plea, he ought not to do it, but may plead he is not truly informed &c., and it shall be entered on the roll to save him from damages.

§ 3. In debt plea, *non est factum*, and afterwards the deft. relinquish this plea, and confessed the action, and judgment was in *mis-recordia*,—and good, for he confesses, and it is not found against him, and he has not troubled the court and jury.

§ 4. If the deft. plead a *sham plea*, he will not be allowed to withdraw it, and plead the general issue; the *sham plea* was a recovery in the K. B. for the same offence.

ART. 13. *Pleading to avoid prolixity*.

§ 1. The modern rule is, that where the matters to be pleaded tend to *infiniteness* or *multiplicity*, whereby the record may be incumbered in the length thereof, to allow general pleading; and particular or general pleading must be according to the nature of the subject matter. See *Bristow v. Wright*; correct principles.

8 D. & E. 571,  
Bonfil v.  
Leigh.

4 D. & E. 370,  
Wallace's  
case, cited 1  
Saund. 96, n.  
1.—1 Stra.  
227.

2 Dallas, 436.

4 Bac. Abr.  
65.—Saund.  
316.

4 Bac. Abr.  
66.—Vent.  
213.—Co.  
Lit. 366.

Cro. Jam. 64,  
Davies v.  
Clerk.—Cro.  
Car. 436.

2 Wils. 369,  
Ellis q. f.

4 Bac. Abr.  
60.

§ 2. Cases; this was debt on a bond conditioned, "that if the deft. at all times, on request, delivered to the plt. all the fat and tallow of all beasts, which he, his servants, or assigns, should kill or dress before such a day, that then the obligation should be void. The deft. pleaded that upon every request made unto him, he delivered to the plt. all the fat and tallow of all the beasts which were killed by him, or any of his servants, or assigns, before the said day." The plt. demurred, and said, the plea was too general; that the deft. should have stated he had delivered so much fat and tallow, which was all &c., or that he had killed so many beasts, whereof he had delivered all the fat and tallow, so that the plt. might have assigned a certain breach; but the court held the plea good; and the plt. ought to shew a breach in some particular. So to account for all monies received *from time to time*.

CH. 180.  
Art. 14.

Cro. El. 749,  
750, Mints v.  
Bethell.—  
See 9 Johns.  
R. 130—4  
Bac. 93.

§ 3. But this rule is not always strictly adhered to when the facts are solely in the deft's. own knowledge; as debt on bond conditioned, that the deft. should deliver briefs to all the churches within such a time, and collect the monies given thereon, and deliver it over to the plt. Held, the deft. could not plead generally, but must shew what briefs were delivered, what sums collected, and that he delivered it to the plt.; for such facts were in his own knowledge only.

4 Bac. Abr.  
93, Wood-  
cock's case.  
—Sid. 215.

ART. 14. *Matters pleaded according to their operation in law.*

§ 1. This is a very important branch in pleading, and as to which the authorities are not very uniform. This branch in pleading has been so largely considered in American Precedents, chapter 4, that it will be necessary to add but a few rules and cases in this place.

§ 2. It has been long a question if a party be bound at his peril to plead his deed or writing, according to its legal operation, where that varies from the words, or may plead it in the words of it, and leave the construction to the court. The better opinion seems to be, that he shall plead it according to its legal effect or operation. In some he must so plead, as where A and a *feme covert* sign a note, the promisee must declare on it as the note of A alone; and no doubt the party does well to plead his instrument according to its legal operation, as the court observed in this case, where the grant of a rent by deed, under the circumstances, operated as a covenant to stand seized, and said the deft. had done well in pleading it as a conveyance by way of covenant to stand seized; for if he had pleaded it as a grant of the rent, it would have been void.

Carth. 308,  
Osman v.  
Sheafe.—2  
Saund. 976, n.  
2.—4 Cruise,  
186.

CH. 180.

Art. 14.

3 Lev. 291,  
Baker v.  
Lade, cited  
2 Saund. 97,  
b. c. n. 2.—  
And so are  
Cro. El. 166,  
Taylor v.  
Vale.—4  
Mod. 149,  
this case,  
Baker v.  
Lade.—2  
Vent. 145.—  
Ld. Raym.  
308, 312, 341,  
403.—2 Vent.  
149.—Com.  
D. Pl. C. 37.  
1 Vent. 109.—  
Ray. 187.—  
Stra. 934.—  
Willes, 673,  
682.—1 Lut.  
789.—1 Mod.  
175.—4 Mod.  
151.

§ 3. So in replevin the deft. avowed for rent, and pleaded a grant of a rent charge to another, and brought it down by several *mesne* conveyances to the deft's. father, in fee; and he being so seized by indenture in consideration of natural love and affection to his son, the deft., and £5 paid by him, gave, granted, assigned, and transferred the rent to the deft., in fee; "which said grant, there being no attornment, or other execution had thereon, except only the sealing and delivery of the deed, operated by way of covenant to stand seized to the use of the deft., whereby and by force of the statute for transferring uses into possession," the deft. was seized, and avowed for so much rent in arrear; on which the plt. demurred; and held, that pleading that "no attornment or any other execution had thereon;" and so pleading the special matter, and leaving the determination of the law to the court was impertinent and idle: 2. Held, by three judges, that pleading in the words of the deed, "that he gave, granted," &c. was sufficient, and the court would construe them according to their legal operation; but they agreed, the deft. might have pleaded this conveyance as a covenant to stand seized of the rent to him and his heirs, and said, this would have been the better pleading. But Pollixsen C. J., held, that pleading in the words of the deed was bad; and that it should have been pleaded as a covenant to stand seized (its legal operation) to the deft. and his heirs; and on error brought, his opinion was confirmed, and judgment reversed. But if a verdict find A granted, it shall be construed as it operates in law.

4 Mass. R.  
414, Dowe v.  
Tuttle.

§ 4. In this case A gave a note to B, to pay him \$1000 in sixty days, and B, when the note was given, gave a promise not to demand it in less than ninety days. Held, B might recover the note in sixty days, and that his promise was in law collateral, on which A might have another action, if B sued before the ninety days were expired, and there was a sufficient consideration for B's promise. The legal operation was to give another action on B's promise, and not to bar his action on the note.

Mass. S. J.  
Court, April  
term, 1803,  
Essex, Cook  
v. Griffin.

§ 5. In this case A, as executrix, sold by order or license of court certain lands. The evidence produced was, that she was empowered by such order as administratrix to sell. Held, the sale made by her was valid, and that this was the legal operation of her conveyance.

Mass. S. J.  
Court, Feb.  
1803, Boston.

§ 6. In this case the grantor sold the lands as his own. The evidence was, that he as administrator, had power to sell. Held, his deed operated in law as his deed as administrator.

§ 7. In this case the rule is stated to be, that it is always allowable, and often necessary to declare according to the legal effect and import of a written contract, rather than in its precise words; and a promise to a judgment creditor, "if the execution can be delayed," is equivalent to saying, "if you will delay it," or "in consideration that you will delay it," all of the same legal operation; and such promise is valid, being in writing, if the creditor do delay, though his promise be not in writing. *Wildman v. Glassop*, Ch. 221, a. 7, s. 16.

CH. 181.  
Art. 1.

10 Mass. R.  
230, Lent &  
al. v. Padel-  
ford—Ch. on  
Pl. 298—  
1 Barnwall &  
Alderson R.  
9.

§ 8. *Contract must be proved as laid.* Deft. was sued in *assumpsit*, as a carrier for the loss of goods, the contract was laid to carry from A to B; a variance in the evidence as to the *termini*, is fatal. 2 Starkie, 385, *Tucker v. Crocklin*. A contract is entire, and must be proved as it is alleged; see Ch. 153, a. 4, s. 14; Ch. 153, a. 9, s. 5; 1 D. & E. 240; 1 D. & E. 447; Ch. 119, a. 2, s. 17; Ch. 211, a. 14, s. 2; 2 East, 212; East, 452; 4 Taun. 320, *Brown v. Sayce*; 4 Taun. 700, 810; 5 Taun. 108; 3 Maule & Selw. 173; 4 do. 505; 3 Bos. & P. 559; Ch. 9, a. 5, s. 1; Ch. 175, a. 6, s. 33; Ch. 120, a. 2, s. 16; 13 East, 410, *Gladstone v. Neale*. Goods sold; declaration, eight tons; contract, about eight tons. The exact amount not ascertained till just before the suit; held, well enough. Many other cases in this work, where the evidence has, or has not, proved the contract as laid in the declaration; as *Crawford v. Morril*; *Phillips v. Rose*; *Pease v. Morgan*; *Wilmot v. Monson*; *Jerome v. Whitney*; *Drake v. Watson*; *The People v. Runkle*; *Baylies v. Fettyplace*, &c.

*Bell v. Allen*,  
3 Munford's  
R. 118.—Ch.  
120, a. 2, s. 16.  
—2 Mun. 310,  
*Whitock v.*  
*Ramsey*,  
adm.

## CHAPTER CLXXXI.

### PLEADINGS.—DEMURRERS.

ART. 1. *General Principles.* A demurrer always admits the facts pleaded by the other party, and makes a question, if by law he has a right to recover, or if his matter pleaded in defence be a bar to the action; if his plea be good in substance or in form &c.; and a demurrer may be to the declaration, or to the plea or bar to the replication or rejoinder, or other parts in pleading, for want of substance, or for want

CH. 181. of form: so it may be to a voucher, or aid prayer; and  
 Art. 2. when a demurrer is to evidence, it is admitted; but its operation in law is denied. A demurrer always raises a question of law, never a question of fact: also a demurrer admits all such facts as a jury may infer. Dougl. 131. The law requires two things in every plea: 1. Substance, or sufficient matter: 2. That this matter be deduced, arranged, and expressed in due form of law; and if either be wanting, it is cause of demurrer. Of the first, general; of the second, of special demurrer. Special demurrers were introduced by the 27 El. c. 5. How the court examines the plt's. pleadings when he demurs specially to the def't's. rejoinder. See Ch. 27, a. 6, s. 5, special case. On demurrer, the judgment of the court must be against the party who commits the first error. 5 Cranch, 257, 261; 2 H. Bl. 187. General demurrers and pleas also, to the whole declaration at the same time, where good; Ch. 144, a. 17, s. 14.

ART. 2. *Rules in demurring.*

See Ch. 100,  
 a. 2—Co. L.  
 72.—4 Bac.  
 Abr. 136.—3  
 Salk. 122.

§ 1. 1st Rule—To evidence is an acknowledgment that the evidence produced at the trial by the adverse party is true, but denies its operation in law; and thereupon he demurs, and prays the judgment of the court; for the facts being agreed, the judges are the proper expositors of the law; and if the court overrule evidence which ought to be admitted or rejected; or improperly overrule a demurrer to evidence, this is a proper ground for a bill of exception.

5 Co. 104,  
 Baker's case.  
 —Style's P.R.  
 189—7 Ins.  
 Cl. 2, 141, &c.  
 —Cro. El.  
 762.

§ 2. 2d Rule—If the plt. give in evidence any matter in writing, or record, and the def't. demurs thereto, the plt. must join in demurrer, or waive his evidence; but according to several authorities, it is discretionary with the court, whether or not to force one to join in demurrer to evidence; for if there be not colourable matter of demurrer, the court will not force the party to join. In other books it is said, the party is not compellable to join in demurrer to evidence given by witnesses, because on a demurrer, the credit of the testimony is not to be examined by a jury. In this last case of witnesses, there seems to be a reason for the court's having a discretionary power to compel &c.

6 Co. 104.—4  
 Bac. Abr. 136.

§ 3. 3d Rule—If a party produce a witness to prove a fact, the other party may admit his testimony to be true, and demur to the evidence.

§ 4. 4th Rule—On demurrer to evidence the jury may assess the damages conditionally. See Ch. 100, a. 2.

Dougl. 119 to  
 134, 224,  
 Cockfedge v.  
 Fanshaw.—2  
 Wash. 210,  
 213, Stephens v. White.

§ 5. 5th Rule—He that demurs to evidence, must admit the whole matter of fact to be true. See Ch. 100, a. 2; and every conclusion of fact the jury may infer from the

evidence demurred to, considered more at large, Ch. 100, a. 2; English and American cases on this point.

§ 6. 6th Rule—Demurrer admits the facts pleaded by the other party, and raises a question of law, if he has a right to recover, or if his defence can avail him.

§ 7. 7th Rule—No advantage can be taken of defects in form, on a general demurrer; and on a special demurrer, no advantage can be taken of any matter of form, not specially pointed out therein; but advantage may be taken of any matter of substance; for he that demurs specially waives all other matters of form, except what he sets down.

§ 8. 8th Rule—A demurrer admits such matters of fact as are sufficiently pleaded; but not matters insufficiently pleaded. In covenant some breaches well assigned, some not; the deft. demurred to the whole declaration. The plt. shall have judgment for those well assigned, and be barred for those not. *Rex v. Flint*, 3 Wils. 292. One trespass well alleged is sufficient on demurrer.

§ 9. 9th Rule—To the same declaration, plea, replication, &c. there may be an issue in law, on demurrer to one distinct part, and an issue in fact to another; but the party can never plead and demur to the same fact; and on demurrer to part, and issue to part, the order regularly is to give judgment on the demurrer first, and let the jury assess damages on the whole. But *Stra. 507*, the jury may first try the issue and assess contingent damages, on the demurrer; and the court may direct either first.

§ 10. 10th Rule—One entire plea bad in part, is bad in the whole; and *Co. Lit. 72*, it is said, sometimes one may plead special matter, and conclude with a demurrer; and all parts of pleading ought to be according to the rules of law; and if any part fail, the whole is bad, and may be demurred to.

§ 11. 11th Rule—Demurrer to the declaration, is "because the declaration aforesaid, and the matter therein contained is insufficient in law" &c.; to the plea, "because the plea, aforesaid, and the matter in the same contained, is not sufficient in law" &c.; wherefore, for want of a sufficient declaration, plea, &c. he prays judgment &c. Joinder, "that the declaration, plea, &c., and the matter in the same contained, are good and sufficient in law, and he prays judgment &c."

§ 12. 12th Rule—As to a demurrer in abatement. In *Lil. Ent.* the deft. pleads, that the declaration, and matter in it, is not sufficient, and prays it may be quashed, and for causes says, that no town is alleged, in which the close was

*Co. Ent. 3, 122.—2 Saund. 144.—Salk. 220, Dominique v. Davenant.—3 Lev. 223.*

CH. 181.  
Art. 2.

3 Bl. Com.  
396.

4 Bl. Com.  
133.—Mass.  
act. Oct. 30,  
1784.—27 El.  
c. 5.—7 Ins.  
Cl. pref.—4  
& 5 Anne, 16.

Co Lit. 72 —7  
Co. 23.—Hob.  
56.—2 Saund.  
379, 380 —  
Salk. 687.

Co. Lit. 71.—  
Com. D. Pl.  
E. 1.—2 Wils.  
85.—1 Ins.  
125.—5 Bac.  
Abr. 238.

7 Ins. Cl. 102.  
—1 Saund. 6.  
Co. Lit. 72.—  
4 Bac. 129.

Co. Lit. 71.—  
4 Bac. Abr.  
130.—Ins. Cl.  
various  
books of  
forms.

Lil. Ent. 106.—  
Ch. 176, a. 1.  
—3 Salk. 19,  
Barcourt v.  
Hastings.—  
Willes, 479.—

—3 Lev. 223.

CH. 181.  
Art. 2.

broken &c.; and 1 Inst. 303, is a demurrer in abatement; but Salk. 212, it is said, that mistakes in declarations cannot be taken advantage of in abatement, but the deft. must demur to it; and 4 Bac. Abr. 8, 130, it is said, if the deft. demur in abatement, the court will give final judgment; for there can be no demurrer in abatement; for if the matter of abatement be *extrinsic*, the deft. must plead it; if *intrinsic*, the court will take notice of it themselves; but this was before the statute of Anne. To the deft's. demurrer in abatement the plt. may join in bar.

7 Inst. Cl.  
preface.

§ 13. Rule 13th—A double demurrer or a demurrer for *duplicity* may be demurred to, and a demurrer is *double* when one assigns for cause of demurrer, an error in *fact*, and error in *law*, for either is sufficient to overthrow the plea; and hence he may insist on either, but not on both; and a demurrer must be joined to make an issue.

1 Burr. 318.  
2 Stra.  
1181, Herbert  
v. Griffith—  
Show. 213.—  
Yelv. 38.—4  
Bac. Abr. 133.  
—Stra. 954.  
—1 Burr. 316,  
Ch. 149, a. 2.  
—5 Mod. 18.

§ 14. Rule 14th—After joinder in demurrer the party cannot amend; see rule Massachusetts Supreme Judicial Court, December, 1780, which provides, that in all cases, except after joinder in demurrer, the plt. shall have leave to amend his writ and declaration, upon his paying the deft. his costs, or agreeing to a continuance at the deft's. election; but on such amendment the deft. may plead anew; but in the English practice, after joinder and argument on demurrer, party allowed to withdraw and amend, paying costs, but not after trial; and so has been our practice in divers cases; see Withdrawing Pleas, Ch. 183, a. 2; and usually the costs are nominal; and after the parties have joined issue, neither of them can demur without consent, for by joining issue, they admit the pleadings to be sufficient to try it,—though no amendment usually after joinder in demurrer, and entered of record; yet held, that if the plt. declare, deft. pleads, plt. replies, and the deft. demurs, and the plt. joins &c.; the plt. may move to amend, paying costs, if the cause remain in paper. So he may withdraw a demurrer, not entered of record, and move to amend, but not a *frivolous* demurrer, though he have a good defence on the general issue.

§ 15. Rule 15th—Though some things be pleaded as a release &c. which might on *nil debet* be given in evidence, yet in many cases it is no cause of demurrer,—as stated, Evidence, and Ch. 178, a. 5.

Co. Lit. 72.  
—4 Bac. Abr.  
130.

§ 16. Rule 16th—As has been stated in some cases, a man may allege special matter, and conclude with a demurrer as in trespass for taking a horse; the deft. says, he was possessed of the horse till dispossessed by one J. S., who gave him to the plt.; he replies, that J. S., named in the bar, and J. S., the plt., are all one person, and not divers, and

demurs to the plea. Held well, and without this special matter he could not demur.

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§ 17. Rule 17th—In some cases, if a part of the declaration be bad, yet the plt. may have judgment for the other parts, though the deft. demur &c., “as in trover for several things, and among the rest for *duobus fulcris*; deft. demurred, and Holt, C. J. refused to give judgment that the plt. take nothing by his bill, saying the plt. may take several damages and release as to this, and then take judgment as to the rest, and all would be well.”

Salk 218,  
Benbridge v.  
Day.

§ 18. Rule 18th—A judgment on demurrer is as binding as after verdict; but on a plea to the jurisdiction, person, writ, aid, prayer, view, essoin, voucher, and demurrer joined on such prayer or plea, and ruled against him who demurred, there is only a judgment to answer over; and it seems to be the better opinion, that a general demurrer, concluding in bar of an appeal or indictment; or a demurrer to a plea in bar which admits the fact; or a demurrer to a replication to such plea is peremptory: but *quare* as to capital cases.

10 Co. 58 —4  
Bac. Abr 132.  
—Dyer 69.—  
2 Haw. P. C.  
334.—Cro.  
El. 169.

§ 19. Rule 19th—A general demurrer being where no particular cause is assigned, admits all such matters as are well pleaded; and a demurrer to a plea &c., because it is uncertain and wants form, is a general one. But a special demurrer is where the particular matter objected to is pointed out, and insisted on as cause of demurrer. And it is a good general rule always to shew the cause of demurrer; per Coke.

4 Bac. Abr. '  
132.—5 Com.  
D 473.—  
Show. 242.—  
2 Buls. 267.

§ 20. Rule 20th—Under a demurrer to the declaration, the deft. cannot take advantage of defects in the writ. If he would object to the plt.'s writ, he must do it by pleading in *abatement*.

3 Mass. R.  
196, in Cook  
v. Gibbs.

§ 21. Rule 21st—There can be no *repleader* after a demurrer; for by it both parties submit to the judgment of the court; nor can there be any demurrer to a demurrer, except for *doubleness or defect in form*; and when a demurrer is entered, it cannot be waived but by consent of parties and leave of the court. The motion was to waive the demurrer, and plead *nil debet*; and the court held it could not be done without the plt.'s consent; and duplicity must be pointed out.

Salk. 219,  
Sampson v.  
Shortidge.—  
Lib. Regr.  
438.—Cro.  
Car. 513,  
Salory v.  
Jackson.—  
Salk. 219.

§ 22. Rule 22d—Debt on a bond conditioned to perform an award. Plea, no award; the replication shews an award, but does not shew a breach. This is bad on a *general* demurrer; for without a breach there is no cause of action: this is a matter of *substance*. So if the award read an *oyer*, and the award set out by the plt. in his replication, differ in a material part, this is matter of *substance* also, and may be demurred to *generally*; otherwise, if they differ in a *void* part, and such defect in *substance* is not aided by verdict.

Cro. Jam.  
220, Barret v.  
Fletcher.—  
Salk. 72,  
Tonland v.  
Marygold.

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Stra. 685,  
Hilbut v.  
Held.

1 Wils. 252,  
Bedford v.  
Alcock.

Hob. 56, in  
Foster v.  
Jackson.

Hob. 53, in  
Foster v.  
Jackson.

3 Salk. 274,  
cites 2 Lil.  
1230; and  
cites 2 Lil.  
1313.

Platt v. Hill,  
3 Salk. 296—  
3 Salk. 330.

Cro. Car. 20,  
White v. Ris-  
den.

§ 23. Rule 23d—Where a matter of *fact* properly assignable, as matter *not against the record*, is assigned for error; a demurrer, as the plea in *nullo est erratum*, is a confession of the fact; but where the matter of *fact* is not properly assignable by law, as a matter *against the record*, is assigned for error, there a demurrer, as aforesaid, does not admit the fact; and Salk. 268; Cro. Jam. 244; Cro. Car. 53.

§ 24. Rule 24th—If there be several counts in a declaration, and a general demurrer to the whole, and one count is good, the plt. shall have judgment if the counts can be joined; and a count on a *mutualus* was well joined with one for *debt* for an *amerciament* in a *court leet*.

§ 25. Rule 25th—Though the demurrer be joined on a *certain point*, on which, if it stood alone, judgment should be for one party, yet if there be on the *whole record*, cause to judge against him, the court must give judgment against him; for the court must judge on the *whole record*, and are not tied up by *consent of parties*.

So if the jury find rents, assets in the hands of executors, which by law are not assets, the court will judge on the whole record, and so no assets; as the rents run with the reversion.

§ 26. Rule 26th—per Holt C. J. There were demurrers *special* at common law; but they were necessary only in cases of *duplicit*y, and therefore not often used; for as the law was then taken to be on special demurrer, the party could take advantage of no other defect in the pleading but that which was specially assigned for cause of demurrer; but on a *general* demurrer he might take advantage of all manner of defects, that of *duplicit*y only excepted; see rule 7th, above.

§ 27. Rule 27th—On a *general* demurrer, plea he was *seized*, but not stating of what estate, is bad; as in *replevin* for taking in Overfield &c.; the deft. pleaded he was seized of three acres of land in Overfield, but did not say *in fee*, or of what estate he was seized; and on *general* demurrer the plea was adjudged ill,—for that cause; but to a plea in bar of an action of *trespass*, it was otherwise adjudged.

§ 28. 28th Rule—If a pleader misrecite a *private* statute, the adverse party cannot demur; for on demurrer it must be taken to be as it is pleaded; but must plead *nul tiel record*; but if he misrecites a *general* statute, the other party cannot plead *nul tiel record*, but must demur; 3 Salk. 294.

§ 29. Rule 29th—Are defects on *demurrer*, not so in *arrest of judgment*? as where the deft. may demur for the *double-ness* of the declaration, as containing matter of *tort* and matter

of contract, but cannot after a regular trial *move it in arrest of judgment*. CH. 181. Art. 2.

§ 30. Rule 30th—Where the *estoppel* appears on the record, the other party may demur. 2 Ld. Raym. 1154, Kemp v. Goodall. 1 Salk. 277,

§ 31. Rule 31st—If the plt. by his replication acknowledge part of the debt paid, and yet demands judgment for the whole, it is bad on demurrer, as being *repugnant* to demand the whole, yet to confess part paid. 4 Burrows, 2482, Vigers v. Aldrich.

§ 32. Rule 32d—If the deft. is *estopped* by the record as to say his name is *Walter*, where sued by the name of *William Freak*, and he pleads this, the plt. must *not demur*, but plead this matter; and it may be added generally, a demurrer to a plea of *misnomer* is not good; perhaps never but when the deft. pleads a *misnomer* inconsistent with some fact he admits on the record to be true; or a *misnomer* where a legal addition is given him by the plt. 3 Salk. 152, Pleddall v. Freak.

§ 33. Rule 33d—A demurrer is ill to a plea of a record of the same court; as in *scire facias* against bail; plea, no *capias* against the principal; replication stated one *prout patet per recordum* &c.; deft. rejoined *nul tiel record*; plt. surrejoined—*habitur tale recordum*, and prayed the court to inspect the rolls; deft. demurred,—demurrer held ill; and the court said the deft. by his demurrer, only denied the court could inspect the records in the court before them; judgment against him. 1 Stra. 556.—2 Salk. 566, Moor v. Mamaujet.

§ 34. Rule 34th—Though the plt. have a *right of action at law*, it is no cause of demurrer; he files his bill in equity against an executor seeking to *discover* assets. 2 Cranch, 417, 418, Telfair v. Stead.

§ 35. Rule 35th—It is a general rule, that upon demurrer, the judgment of the court must be against the party who commits the first error; the want of *oyer* of a condition of a bond is fatal in a plea of performance. 6 Cranch, 257, United States v. Arthur.

§ 36. Rule 36th—Defects in form in a plea in abatement may be taken advantage of under a *general* demurrer; no reason appears to be given for this decision, except it may be perhaps the general reason, that a plea in abatement is a *dilatory* plea, and not to be favoured. 4 D. & E. 370.—1 Mass. R. 496.

§ 37. Rule 37th—A *demurrer in bar* to a plea in *abatement* works a *discontinuance*. 1 Ld. Raym. 393, Leig v. Goodwin.

§ 38. Rule 38th—On a general or special demurrer, the party demurring may take advantage of any *substantial* or *radical* error in pleading.

§ 39. Rule 39th—Whenever the deft. pleads a plea, which on the face of the proceedings, he appears to be *estopped* to plead, the plt. may demur to his plea, and insist on the *estoppel* in his demurrer. Willes, 39.

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2 Willes, 85,  
Coke v. Say-  
er.

3 Salk. 294.  
—2 Wils.  
113.—3 Salk.  
294, Croch-  
mere v. Wick-  
ens.—2 Salk.  
666.

1 Johns, Cas.  
135, Griswold  
v. Haskins.

§ 40. Rule 40th—Though it is usual to demur in a particular manner, yet a demurrer is good, if so in *substance*, and shews the party demurring means to rely on a legal insufficiency in the declaration, plea, &c. of the other party. 5 Mod. 132; 3 Lev. 222.

§ 41. Rule 41st—Not guilty, and not guilty within six years, in an action of *crim-con*; issue to one, plea and demurrer to the other; and verdict for the plt. on the issue; judgment for the deft. on demurrer. Held, the plt. can have no damages; judgment for the deft. on the demurrer to the second plea held good.

§ 42. Rule 42d—Where *nul tiel record* is pleaded, the party cannot demur to it, and *nil debet* to a bond is bad on general demurrer; debt in B. R., plea, another action pending in the same court between them, for the same cause; replication, *nul tiel record* &c. Held, deft. might pray *oyer* of the record, and court inspect it: judgment on failure. So deft. may plead *nul tiel record*, and an entry may be made for the court to examine it; but deft. cannot rejoin *quod habitur aliquod tale recordum*, nor can he demur, for the record is perfect, and the pleading is at an end.

§ 43. Rule 43d—Though the deft. has a good defence, yet if he put in a *frivolous* demurrer, he cannot afterwards withdraw it and plead the general issue.

§ 44. Several forms in demurrer; 10 Wentw. 463, 468, 474; other forms, 1 Wentw. 313, 407, 441; 3 Wentw. 40, 467, 371; 5 Wentw. 29, 50, 203, 325, 357, 403, 443, 446, &c.; and many other useful forms referred to index of 10 Wentw. 21 to 38; Doctrines of Demurrers, 7th volume Inst. Cl.

ART. 3. *Conclusions of demurrers in sundry cases.* These conclusions as pleaded both by plts. and defts. are useful, and in substance apply in several other parts of pleadings, as they contain the party's prayer of judgment, and may be brought within a narrow compass; and follow the body of a demurrer nearly the same in all cases: generally translated from the best Latin forms. These few concise forms contain near all the prayers of judgments a party can want, in correct technical language, in his various pleadings; and it is ever material to keep the judgment in view, wanted &c.

§ 1. Common demurrer to a declaration; and the said D. (def't.) by A B, his attorney, comes and defends the force and injury &c., when &c., and says, that he, by reason of the said writing obligatory declared on, ought not to be charged with the said debt, because he says, the said declaration, and the matter therein contained, are not sufficient in law, for the said P. to have and maintain his action afore-

said, against the said D., and to which he is not bound by law to answer; and this he is ready to verify; wherefore, for want of a sufficient declaration in this behalf, he prays judgment, and that the said P. may be precluded from having his said action against the said D., and for his costs —. This is the deft's. demurrer and conclusion in bar; and answers in every case in which the deft. demurs in bar, and prays judgment only for his costs; varying the expression as to the deft's. being not chargeable, according to the subject matter.

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§ 2. *In audita querela*, he, (def't.) prays judgment, and his execution of his debt and damages aforesaid by virtue of the judgment aforesaid, to be adjudged to him &c. 3 Ins. Cl. 157.

§ 3. *In scire facias*, prays judgment of the said writ of *scire facias*, and that the said P. from his action aforesaid, may be precluded. 3 Ins. Cl. 170.

§ 4. *In an information*; and the said citizens of S. pray judgment, and that their liberties, privileges, and franchises, may be allowed and adjudged to them, and their successors, forever; and also, that they, as to the premises aforesaid, by this court, may be dismissed. 7 Ins. Cl. 75.

§ 5. *In qui tam*. The said D. prays judgment, and that said P. who prosecutes as well for —, as for himself, may be precluded from having his said action. 7 Ins. Cl. 101.

§ 6. *After the last continuance*. He prays judgment if the plt. his action aforesaid, ought further to maintain. In each case in which the deft. may have costs, he must add, and for his costs. 7 Ins. Cl. 141.

§ 7. *In audita querela*, def't. says, the plt's. said writ and declaration, are not sufficient in law to bar or delay the deft. of the execution of the said judgment against the plt., and thereto the deft. is not bound by law to answer; and this he is ready to verify; wherefore, for want of a sufficient writ and declaration, in this behalf, he prays (as above.) 3 Ins. Cl. 157.

§ 8. Plt. joins in demurrer thus: and the said P., because he has sufficient matter in law alleged in his said writ and declaration, to bar the said D. from the execution of the said judgment obtained against the said P., which matter the said D. hath not denied or any way answered, but that averment hath refused to admit, P. prays judgment, and his damages by occasion of the premises to be adjudged to him. 7 Ins. Cl. 4, 5. —Wi. Ent. 8.

§ 9. *In scire facias*, the def't. says, the plt's. said writ of *scire facias*, in manner and form aforesaid, in court here sued out and prosecuted, and the matter therein contained, are not sufficient in law, for the plt. to have and maintain his execution aforesaid, for the said £161, against the said D.; and that he, to that writ of *scire facias* in manner aforesaid

CH. 181. made, is not bound by the law of the land to answer; where-  
 Art. 3. fore, he prays judgment (as in *scire facias* above.)

§ 10. When the deft. pleads in bar of the plt's. action, and the plt. replies and demurs, the plt's. *conclusions* in sundry cases, are as follows: and said plt. says, that for any thing by the said D. above, in pleading alleged, he, the said plt. from having his said action against the said D. ought not to be precluded; because he says, the said D's. plea aforesaid, and the matter therein contained, are not sufficient in law to preclude the said P. from having his said action against the said D, and to which the said P. is not bound by law to answer; and this he is ready to verify; wherefore, for want of a sufficient answer in this case, the said plt. prays judgment, and his damages, by occasion of the premises, to be adjudged to him, (and for his costs.)

Cl. Ins. 307. § 11. *In assault*, plt. prays judgment, and his damages, by occasion of the trespass and assault aforesaid, to be adjudged to him.

3 Ins. Cl. 158. § 12. *In audita querela*, plt. prays judgment, and that he by virtue of the writing of release aforesaid, may be discharged from every execution by reason of that judgment aforesaid, against him, as aforesaid rendered.

Cl. Ins. 307. § 13. *In covenant*, plt. prays judgment, and his damages, by occasion of the breach of the covenant aforesaid, to be adjudged to him &c.

Cl. Ins. 307. § 14. *In debt*, he prays judgment, and his debt aforesaid, together with his damages, by occasion of his detaining that debt, to be adjudged to him.

2 Ins. Cl. 170. § 15. *In formedon &c.* he prays judgment, and seizin of  
 —Co. Ent. the tenements aforesaid, with the appurtenances, to be ad-  
 335. judged to him.

3 Ins. Cl. 152. § 16. *In annuity*, prays judgment, and his annual rent  
 —Wi. Ent. 8. aforesaid, and the arrearages of the same, together with his  
 damages, occasioned by his withholding that rent, to be ad-  
 judged to him.

Cl. Ins. 307. § 17. *In trespass*, prays judgment, and his damages, by occasion of the trespass aforesaid, to be adjudged to him.

7 Ins. Cl. 30.— § 18. *In scire facias*, plt. prays judgment, and his execu-  
 2 Saund. 341. tion aforesaid, for the said £161, against the said D., to be  
 adjudged to him.

3 Ins. Cl. 179. § 19. *In waste*, he prays judgment, and that his writ afore-  
 said, may be adjudged good, and his damages, by occasion  
 of the waste aforesaid, may be adjudged to him.

7 Ins. Cl. § 20. *In an information*, he the said P., who sues as well  
 160, 166. for —, as for himself, prays judgment, and that the said  
 D. may be convicted of the premises in the information  
 aforesaid, above specified.

§ 21. *In trespass and imprisonment*, plt. prays judgment, and his damages, occasioned by the trespass, assault, and imprisonment aforesaid, to be adjudged to him. 7 Ins. Cl. 125. CH. 181.  
Art. 3.

§ 22. *In mayhem*, prays judgment, and his damages, occasioned by the *mayhem* aforesaid, to be adjudged to him. 7 Ins. Cl. 194.

§ 23. *In ejectment*, prays judgment, and the possession of his term aforesaid, of, and in, the said messuage, with the appurtenances yet to come, together with his damages &c., may be adjudged to him. This was the old English form; but now prays seizin of the tenements aforesaid, with &c.; or seizin and possession of the moiety aforesaid, with his damages, occasioned by the disseizin aforesaid, to be adjudged to him; or only for possession of, &c., and costs. Wi. Ent. 398.

§ 24. *In dower*, prays judgment, and that the dower of the said P. of the tenements aforesaid, whereof she hath demanded dower, may be adjudged to her. Our law adds damages and costs. 7 Ins. Cl. 64

The following are *select demurrers*, in a few cases. One each, with its appropriate *conclusion*, or prayer of judgment. This mode of stating the law in this instance, is adopted, because not only the law, but the form also, may be stated in a few words.

§ 25. Plt's. demurrer to the deft's. plea in abatement; and the said P., by A B, his attorney, says, that for any thing by the said D. above, in pleadings alleged in abatement of the plt's. said writ, it ought not to abate, because he says that plea, and the matter therein contained, are not sufficient in law, to which the plt. is not bound by law to answer; and this he is ready to verify; wherefore, he prays judgment, and that his said writ may be adjudged good. 7 Ins. Cl. 41.—  
7 Ins. Cl. 137.

§ 26. *Deft's. joinder in demurrer*; and the said D. says, because he has alleged sufficient matter in law to abate the said writ, which he is ready to verify, and which matter the said P. hath not denied, or any way answered, but that averment has refused to admit, he, the said D., as before, prays judgment, and that the said writ may abate. 7 Ins. Cl. 41,  
and 137.

§ 27. Plt's. demurrer to the deft's. plea in bar. See s. 10.

§ 28. *Deft's. joinder in demurrer thereto*; and the said D. says, his plea aforesaid, in manner and form above pleaded, and the matter therein contained, are sufficient in law to preclude the said P. from having his said action against the said D.; and this he is ready to verify, and prove as the court here shall direct; and because the said P. hath not answered, or any way denied the same, the said D. prays judgment, that the said P. may be precluded from having his action aforesaid, against the said D., (and for his costs.) 7 Ins. Cl. 6a

CH. 181. § 29. Plt's. demurrer to a plea in bar, in *audita querela* ;  
 Art. 3. as in sec. 10 ; except say, to preclude the said P. from

7 Ins. Cl. 47. avoiding the said execution upon the said recovery ; and he prays judgment, that the said D. may be precluded from having any judgment upon the said recovery ; and that the said P. may be restored to all things which, by occasion of the judgment aforesaid, he lost.

7 Ins. Cl. 47. § 30. *Def't's. joinder in demurrer* ; and the said D., because he hath alleged sufficient matter in his said plea, to preclude the said P. from avoiding the execution on the said judgment, which he is ready to verify ; which matter the said P. hath not denied or answered ; wherefore, as before, the said D. prays judgment, and that the said recovery in its full force and effect may stand.

7 Ins. Cl. 49. § 31. *Demurrer to bar and avowry in replevin* ; and the said D. says, the said P's. plea aforesaid, in manner and form aforesaid above, in bar of the said D's. avowry aforesaid pleaded, and the matter therein contained, are not sufficient in law, to preclude the said D. from having a return of the said goods, to which he is not bound by law to answer ; wherefore, for want of a sufficient plea in bar, the said D. prays judgment, and a return of the said goods, with his damages, costs, and expenses, aforesaid, by him about his suit, in this behalf sustained, according to the form of the statute aforesaid, to be adjudged to him.

7 Ins. Cl. 49. § 32. *Plt's. joinder in demurrer* ; and the said P. says, that his said plea by him, in manner and form aforesaid, above pleaded, in bar of the said D's. avowry aforesaid, and the matter therein contained, is sufficient in law to preclude the said D. from having a return of the said goods, which plea in bar, and the matter therein contained, the said P. is ready to verify and prove, as the court here shall direct ; and because the said D. hath not denied or answered that plea, the said P. as before, prays judgment, and his damages occasioned by the taking and unjust detention of the said goods, to be adjudged to him, (and for his costs.)

7 Ins. Cl. 99. § 33. In another form, the plt. said, the avowry is not sufficient to maintain the taking of the said beasts in the said place, in which he avows the taking to be just.

§ 34. *Joinder*. Def't. says, his plea is sufficient for him to avow the taking of the said beasts &c.

7 Ins. Cl. 64. § 35. *Plt's. demurrer to the def't's. plea in bar of dower*. The plts. say, that the said D's. plea aforesaid above, in bar of dower pleaded, is not sufficient in law, to preclude her from having her dower of the said tenements, nor is she bound by law to answer the same plea as aforesaid, pleaded ;

and this she is ready to verify ; wherefore, she prays judgment, as sec. 24. Ch. 181.

§ 36. *Def't's. joinder in demurrer.* He says, he has alleged sufficient matter to preclude the plt. from having her dower &c., &c. ; and prays judgment if she ought to have dower &c. Art. 3.  
7 Ins. Cl. 54.

§ 37. *The tenant demands a view,* and the plt. counterpleads the view, thus : and the said P. says, the said D. ought not to have the view of the said tenements, with the appurtenances, whereof she demands dower, because she says, the said J., formerly her husband, died seized of the said tenements, with the appurtenances, whereof she demands dower, in his *demesne* as of fee ; and this she is ready to verify ; wherefore, she prays judgment, and her dower &c., as above. 7 Ins. Cl. 55.

§ 38. *Demurrer to a counterplea with a protestando ;* and the said D. protesting that the said J., the former husband of the said P., did not die seized of any lands and tenements in said B., as the said P. hath above alleged ; says, her said plea in form aforesaid pleaded, and the matter therein contained, are not sufficient in law, to repel the said D. from having the view of the said tenements, with the appurtenances, whereof the said P. demands dower ; and that the said D., to that plea in manner and form aforesaid pleaded, is not bound by law to answer ; and this he is ready to verify ; wherefore, for want of a sufficient plea in this behalf, the said D. prays judgment, and a view of the said tenements, with the appurtenances, to be adjudged to him. The cause of this demurrer was, that the plt. ought to pray judgment, that the def't. be excluded from the view. Adjudged for the plt., on his joinder, that her plea was sufficient to repel him from a view, and prays judgment as in the plea for dower. 7 Ins. Cl. 56.

§ 39. *Plt's. demurrer to the def't's. bar in error ;* and the said P. says, the said D's. plea aforesaid, in form above pleaded, is not sufficient in law, to preclude the plt. from having his said writ of error ; wherefore, for want of a sufficient answer in this behalf, the plt. as before, prays judgment, and that the judgment aforesaid, be revoked, annulled, and held wholly void, and that he be restored to all things which he lost by occasion of that judgment.

§ 40. *Def't's. joinder.* He says, his plea is sufficient for his discharge, and to bar the plt. of his said writ of error ; and prays judgment, that he may in this behalf be precluded ; and that he be dismissed by the court from the premises. 7 Ins. Cl. 67,  
58.

§ 41. *Demurrer to a plea to the jurisdiction ;* and the said P. says, because he above has declared sufficient matter 7 Ins. Cl. 68.—  
Ras Ent. 473.  
—Hern. 317.

CH. 181. against the said D., to which he hath not in law sufficiently  
 Art. 3. answered, he (the plt.) prays judgment, and his damages  
 aforesaid, for want of an answer in this respect, to be ad-  
 judged to him.

Same autho-  
 rities.

§ 42. *Defl's. joinder in demurrer*; and the said D. says, because he hath pleaded sufficient matter to preclude the said court further to hold any plea in this behalf, or thereof any way to take cognizance, he, as before, prays judgment, if the court here will take any further cognizance in the plea aforesaid.

§ 43. *Plt's. demurrer to part of the defl's. bar*; and the said P., as to the said D's. plea aforesaid, above pleaded, as to taking and impounding the said beasts, and detaining them in pound, till the said P. paid 62s., says, that he, for any thing before pleaded, ought not to be precluded from having his action against the said D. because he says, the plea aforesaid, and the matter &c.; as sec. 10.

§ 44. *The plt's. demurrer to the defl's. bar, in trespass, after a new assignment*; and the said P. says, that the plea aforesaid, of the said D., in bar of the said new assignment, and the matter therein contained, are not sufficient in law, to preclude the said P. from having his said action of the breach of close, of treading down and consuming the grass aforesaid; and also the breaking down the doors and fences aforesaid, in the aforesaid close of pasture above, of the new assignment, against the said D., and that to this plea, he is not held to answer &c., &c. Prayer of judgment, as sec. 17; joinder.

§ 45. *Plt's. demurrer to the defl's. two pleas in bar, in assault and imprisonment*; and the said P., as to the said D's. said pleas as to the assaulting, beating, wounding, and ill-treating the said P., by the said D., in form aforesaid, above pleaded, says, the said P., for any thing above pleaded by the said D., ought not to be precluded from having his said action, because the said P. says, the said D's. plea aforesaid, in manner and form aforesaid pleaded, and the matter therein contained, are not sufficient in law, to preclude, as sec. 10; and prays judgment, as sec. 11; and as to the said D's. plea aforesaid, as to the imprisonment and detention of the said P., in prison, for the space of eleven hours, by the said D., in manner and form aforesaid pleaded, the said P. says, he ought not to be precluded &c. as above. One joinder to several demurrers. 2 Lut. 1535. Joinder in demurrer to each above, in the above words nearly.

§ 46. *Plt's. demurrer to the defl's. bar in qui tam*; and the said P. who prosecutes as well for —, as for himself, says, the said plea of the said D. above, in bar pleaded, is not

sufficient in law, to preclude the said P., who &c., from having his said action against the said D.; and that the said P. who prosecutes &c. to that plea is not bound by law to answer; and this he is ready to verify; wherefore, for want of a sufficient plea in this behalf, the said P. who prosecutes &c., prays judgment, and the debt aforesaid, to be adjudged to the —, and to the said P., (and for his costs.)

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7 Ins. Cl. 100.

§ 47. *Def't's. joinder in demurrer*; and the said D., because he has alleged sufficient matter to preclude the said P., who prosecutes &c., from having his said action against the said D.; which he is ready to verify, which matter the said P., who prosecutes &c., hath not denied, or any way answered, but that averment hath refused to admit, prays judgment, as sec. 5.

§ 48. *Def't's. demurrer to the plt's. replication*; and the said D. says, that the said plea, by the said P., in manner and form aforesaid pleaded, in replying, and the matter therein contained, are not sufficient in law, for the said P. to maintain his said action against the said D., to which he is not bound by the law of the land to answer; and this he is ready to verify; wherefore, for want of a sufficient replication in this behalf, the said D. prays judgment, and that the said P. may be precluded from having his said action against the said D., (and for his costs.)

7 Ins. Cl. 109.

§ 49. *The plt's. joinder in demurrer*; and the said P. says, his plea aforesaid, by him in manner and form aforesaid, above in replying pleaded, and the matter therein contained, are good and sufficient in law, for him to maintain his said action against the said D.; and this he is ready to verify; and because the said D. that plea hath not answered, or any way denied, the said P. as before, prays judgment &c. Sec. 10.

§ 50. *Plt's. demurrer to the def't's. rejoinder*; and this is the same as his demurrer to his bar, adding the words, in *re-joining*.

§ 51. *Def't's. joinder*. Same as sec. 28.

§ 52. *Def't's. demurrer to the plt's. surrejoinder*. Same as in replications, only saying, *surrejoining* and *surrejoinder* instead of *replying* and *replication*.

7 Ins. Cl. 137.

§ 53. *Demurrer to evidence*. And the said plt. says, that the matter aforesaid, by the said D. shewn to the jury aforesaid, is not sufficient in law to prove the issue aforesaid within joined on the said D's. part; and the said P. is not bound by law, to answer to that matter; *hoc paratus* &c.; wherefore, he prays judgment, and that his said debt of £20, together with his damages, be adjudged to him. Joinder, def't. says, he has shewn in evidence sufficient matter to the

Ras. Ent. 148.  
—1 Mor. E.  
448.—7 Ins.  
Cl. 142.—1  
Mor. E. 11.

CH. 181. jury, to maintain said issue on his part joined; *hoc paratus* &c.; wherefore, he prays judgment, and that the plt. be precluded from having his action against the said D., and that the jury of their verdict on said issue to be rendered, be discharged &c.

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§ 54. *Case of flowing land.* Plt. complains of this. Deft. justifies a right to do it. Plt. demurs to his plea, and concludes, and prays judgment, and a warrant to be issued to the sheriff of the said county, directing him to summons and impanel a jury of twelve good and lawful men of said county, to be duly sworn, "to make a true and faithful appraisement of the yearly damages, done to the complainant, by so flowing his lands, and how far the same may be necessary;" and for his costs.

These conclusions, or prayer of judgment, or process, apply, and are proper, not only on demurrers and joinders in demurrers in these respective kinds of causes, but also in cases of all pleas, replications, rejoinders, surrejoinders, rebutters, and surrebutters, in the same kind of causes, whenever a party has occasion to ask for a judgment in pleading, as he usually has in pleading to an issue to the country, when he concludes with a verification; for the law in each case fixes the kind of judgment the court is to give, and this the party must pray for, when he prays for any; therefore, it is only for him to know what kind of judgment or process is proper for him, in his case, and this he must pray for, if he prays for any, let his pleading be as it may, demurrer or joinder, plea in bar, replication, rejoinder, &c., &c., meaning to end in an issue to the country; because it is a settled rule, the party must ask for such a judgment, order, or decree, if he asks for any, as he understands the court by law will give.

ART. 4. *Causes of demurrer.*

§ 1. The following are a specimen of those most in use early in the eighteenth century; and these may be insisted on before the words *and this he is ready to verify*, or at the conclusion after judgment prayed; the latter, perhaps, is best: thus, and for causes of demurrer in law, here shews to the court, and sets down the following, to wit: *Because*, no town is alleged in the said declaration, where the said D. (def't.) the close aforesaid, broke and entered; and, *because*, the same declaration is in itself repugnant, insufficient, and wants form &c.; Lit. Ent. 106: *Because*, it does not appear where the said bill of the said D. was exhibited before the said 21st of November, mentioned in the said plea; also, *because* the said D. does not shew by his said plea, when the cause of action aforesaid, last accrued; 7 Inst. Cl. 13: *Because*, the plt. in

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her counter-plea, prays judgment, and her dower in the said tenements to be adjudged to her,—whereas, she ought to pray judgment, that the tenant be excluded from the view; Id. *Because* his said plea is not well concluded; for it concludes, and this he is ready to verify,—whereas, it ought to conclude, and this he prays may be inquired of by the country; Clif. 268: 1 Vent. 204; 7 Inst. Cl. 163: *Because* the said P. hath not shown to the court here by his said declaration, that he, at the time of making the said writing of assurance, had any interest or concern in the said ship, or in her apparel; or that he then had any reasonable cause to make assurance upon the said ship; Reg. placitandi, 140: *Because* it does not appear by the said declaration, that there is any memorandum or promise in the said declaration, specified in writing, signed by the deft., or any other person by him legally authorized, as there ought to be, according to the form of the statute, in this case lately made and provided; Id. 144; (at first it was deemed necessary so to state the writing): *Because* it does not appear how the said P. was seized of the said office of bailiff of — in the said declaration specified, nor what right or title he had in that office; Id. 153: *Because*, the said P. does not conclude his said declaration aptly, to wit, “by which an action accrued to him to demand and have of the said D. the said £20, in the said P’s. declaration aforesaid, above mentioned;” Bro. Red. 223: *Because*, the said P. does not show by his declaration on what day and year he was possessed of the said goods and chattels; or on what day and year the same came to the hands of the deft.; Cl. Ap. 234: *Because* the plt. alleges that the highway was so overflowed by the obstruction of the water, that the inhabitants could not pass, for which cause no particular person can have his action; Win. Ent. 49: *Because* the plt. does not produce the writing of release mentioned in his said declaration; Bro. 70: *Because* the plt. ought to prosecute an action of covenant, and not of deceit; Ras. Ent. 6: *Because* it does not appear the money was demanded within five years in the condition of the indenture mentioned, as within that time, according to the form and effect of the said indenture, it ought to have been done; Reg. Pl. 147: *Because* the plt. demands his debt, together with his damages occasioned &c., where his bill was not in a plea of debt; Thomp. 222: *Because* the breach of covenant aforesaid contains a negative pregnant, to wit: not paying the rent aforesaid to the said A and B, for the use of said D, in which it is implied it is paid to the said A and B, though not for the life of the said D; 3 Inst. Cl. 186: *Because* the plt. in his declaration hath not shewn where the said bond was made: *Because* one is named in the writ, who

CH. 181. did not seal the indenture; Clift. 4: *Because* the plt. hath  
 Art. 4. not declared himself commorant within any town or city, as  
 by law he ought to have done: *Because* the words *per annum* in the plt's. writ are *Latin* words; whereas, the plt. ought to have declared wholly in the *English* language; statute: *Because* many words in the plt's. writ, as *Nov. &c.* are unintelligible, insensible, and not English words.

§ 2. Thus far the causes of demurrer have been to *declarations* in this article. Next follows causes to *pleas in bar &c.*: *Because* the plea is argumentative, negative pregnant, uncertain, and wants form; 2 Saund. 204: *Because* the deft. does not begin his plea by praying judgment of the writ; nor conclude his plea with praying judgment that the writ abate; 3 Lev. 169: *Because* the deft. does not conclude his plea with an averment, as appears by the record: *Because* the deft. has not made any defence; 2 Lut. 1110, 1590; 3 Inst. Cl. 12: *Because* the deft. offers here the said £25 after asking and having leave to imparl; 1 Lut. 226: *Because* the deft. does not say by whom the messuage burnt was rebuilt, nor shows within what time the said messuage was rebuilt after burning there, so that the court can determine whether it was rebuilt in convenient time; 2 Saund. 419: *Because* the plea is argumentative, and does not acknowledge, avoid, or contradict the matter in the declaration; Reg. Pl. 154: *Because* the plea tends only to the general issue; Co. Ent. 24; Win. 63; Bro. Red. 219; Reg. Pl. 153: *Because* the same plea puts double matter in issue; 1 Lut. 72: *Because* the plea puts matter of record and in law in issue; Win. 104: *Because* it tends only to the issue of nontenure; Reg. Pl. 136: *Because* the plea does not answer to the declaration, aforesaid: *Because* it does not appear where the said P. or the said D. ought not to answer to the declaration aforesaid; and *because* it is badly begun, and badly concluded; 2 Lut. 1531: *Because* the deft. does not conclude his plea to the country, as he ought to do; Reg. Pl. 145: *Because* the *testando* is repugnant in itself, and amounts only to the general issue; Win. Ent. 30: *Because*, the said plea traverses what is not traversable, and is repugnant; Mod. Ent. 102; 1 Lut. 632: *Because* the traverse ought to be omitted, and the plea conclude to the country: *Because* the plea is double, and contains two matters, either of which is sufficient; and *because* separate traverses ought to be left out of the plea; Reg. Pl. 147: *Because* the traverse of the tenancy is not material; 1 Co. 74: *Because* he traverses the day of the sale where the sale only is traversable; Hern. 253; and *because* he traverses the day and place, which are not traversable; Vidian, 48; 4 Inst. Cl. 200: *Because* the inducement to the traverse is

insufficient, 1 Co. 64; is repugnant, Win. Ent. 228: *Because* he does not confess, avoid, or traverse any matter of substance, Hern. 652: *Because* the traverse is of matter not traversable in bar &c.; Reg. Pl. 147: *Because* he put in issue the time and place of demanding the sheep. where he ought to traverse the demand only; Lev. Ent. 190: *Because* the inducement to the traverse contains matter confessing the plt's. cause of action; Reg. Pl. 154: *Because* the conclusion of the plea is to the action, and not to the writ; 3 Br. 124: *Because* there is no averment of the same person; Co. Ent. 24: *Because* he does not shew how he was discharged; Hern. 306.

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§ 3. *Awards*—*Because* it is not expressed in the award in what sum the deft. should become bound; Co. Ent. 4; 7 Inst. Cl. 232: *Because* the award concerns strangers, and so the award and promise are void; Co. Ent. 4; wife is a stranger, 7 Inst. Cl. 232: *Because* the award was made by all the arbitrators, yet it does not appear that one of them ever sealed, published, or declared the writing of award; 1 Saund. 168: *Because* it does not appear the deft. had notice of the arbitrator's naming an umpire, or that the umpire had authority to make an umpirage; 2 Vent. 112: *Because* it is not well and positively alleged that the *mainpernors* mentioned in the said plea were sufficient, but by implication only; 2 Saund. 58: *Because* the deft. ought to have pleaded his plea aforesaid, before he demanded his account; 1 Bro. 117: *Because* the said D. does not shew any title or just cause for his beast to go in the highway; Reg. P. 151: *Because* the plea is after imparlance given, by which it appears the deft. was not always ready to pay the money; Reg. Pl. 146: *Because* the plt. has departed from his declaration; 2 Bro. 216; 1 Lut. 1160, 1607: *Because* the custom in the plea specified is not aptly pleaded; 2 Lut. 1186: *Because* it does not appear from what court he appealed; Thomp. 222: *Because* the said 24th day of — is not before mentioned: *Because* the matters in the same plea are jointly in issue; whereas they ought severally to be put in issue; 1 Lut. 244: *Because* the rejoinder is a departure from the bar, and does not answer the replication; Bro. Red. 229; 1 Lut. 427: *Because* the said D. says, he saved the said P. harmless, and shews not *how*; 4 Inst. Cl. 451: *Because* it does not appear that the said D. had any notice that the aforesaid arbitrators named the said C. to be umpire between the parties aforesaid, or that the said C. had any authority to make any umpirage between the same parties concerning the premises aforesaid.

5 Inst. Cl. 40.

*Because* the said D. does not confess, deny, or avoid the debt or writing aforesaid; and *because* he does not allege

5 Inst. Cl. 329.

Ch. 181. any entry or possession of the said M. (lessee) by virtue of  
 Art. 3. the said demise, nor shews any perfect particular estate  
 whereon any reversion can pend or expect.

Farr's R. 106. *Because* on the issue above completely joined, the said —  
 does not conclude to the country.

These, and a multitude more of such causes of demurrer, mostly in matters of *form*, in use a century ago, shew perhaps better than any thing else, the spirit of practice which then prevailed. This kind of practice continued in a good degree in the *province* of Massachusetts; but so much has a liberal spirit in practice increased in the last century in England, and especially in the last fifty years in the United States; and so much has the attention of the bar been turned from matters of *form* to matters of *substance*, that these causes of demurrer in matters of *mere form*, are now comparatively but little in use. However as it is essential to preserve the *forms of good pleading*, as the essence and marrow of the law, the best lawyers and judges have always been attentive to this branch of the law, and though *trifling matters of form*, have of late years been less regarded, yet more *material matters of form* have been always considered as well deserving of attention.

Dougl. 328, Pollybrank v. Hawkins. § 4. *A few modern causes of demurrer.*—*Because* (covenant for rent) the plt. states, that he was seized of the reversion of the said demised lands in his demesne *as of freehold*, in right of A. his wife,—whereas it ought to be alleged, that the plt. and A. his wife, in her right, were seized *in their demesne as of fee* of, and in the said demised premises; rent of her land.


3 D. & E. 185. *Because* the said D. in his said plea of *misnomer*, in abatement, does not pray judgment of the writ.

5 D. & E. 48, Roberts v. Roberts. *Because* the said Richard, by his plea aforesaid, admitted himself to be the person named the deft. in and by the plt's bill and declaration aforesaid: cause held good.

1 Burr. 318, Robinson v. Rayley. *Because* the replication is multifarious, and that several matters specifying them are put in issue,—whereas only *one single matter* ought to be so: also, because the replication concludes to the country—whereas it ought to conclude with averment.

3 D. & E. 66, Summon v. Knox. *Because* the plt. in and by his replication, has attempted to put in issue, a matter wholly immaterial, and therein traversed a fact, whereon no certain or material issue can be taken; and hath not in, or by, his replication traversed, or denied, or confessed the only fact in the plea, whereon a certain or proper issue can be taken; and *because* the replication is in various other respects defective, informal, &c.

6 D. & E. 460, Greenwood v. Burtil. § 5. To replication to deft's. first plea—*because* the plt. had not by his replication given any answer to the plea, nor admitted, or denied that the plt. was indebted to the deft., in

manner and form in the plea alleged, (plea, set-off.) To second plea—*because* the plt. had not in his replication given any answer to the plea, or denied that by the condition of the bond there is expressly reserved above the rate of £5 per cent. &c., &c. Any material averment is traversable though laid under a *videlicet*. CH. 181. Art. 4.  1 Saund. 169.

*Because* the plt. had concluded his plea (in replevin) by putting himself upon the country, whereas he ought to have concluded it by praying that the matter therein contained, might be inquired of, by the country; and also, for that his plea was uncertain, and put a matter in issue which was not issuable. Willes, 475. —See Traverse, Ch 180, a. 4.

§ 6. Replevin—avowry for rent. Plea in bar, *de injuria sua propria absque tali causa*. Demurrer for causes, that the plt. in his plea, offered to put several and distinct matters in issue; that is to say, the holding and enjoying the said dwelling house, with the appurtenances, in the said declaration, and cognizance above mentioned by the said plt.; and hath also in and by his said plea denied that the said rent in the said cognizance mentioned, was due, and in arrear, and unpaid, as in that cognizance is above alleged and contained; and for that the said plt. hath also in and by his said plea tendered and offered to put in issue, as well the times and manner of the payment of the said rent, as also, the amount and quantity of the same; and for that the said plt. should, and ought, in and by his said plea, to have tendered and offered to put in issue one single fact only, to be tried by a jury of the country, and to have relied on the same; and for that in the manner the said plea is above pleaded, no certain or single issue can be joined in the same; and for that the said plea is double, multifarious, and not issuable, and is also in various other respects defective, argumentative, insufficient, and informal. Plea held bad. This demurrer is of tedious length, like many modern ones. 1 Bos. & P. 76, Jones v. Kitchen.

§ 7. *Assumpsit* on a note payable by instalments. Plea, none of the causes of action, except the last, accrued within six years. Special demurrer to it, because the introductory part of it was contradictory to the allegation of the said plea, in this, that the said plea purporting to be pleaded in bar to part only of the said several causes of action in the said declaration mentioned, contains matter alleged and pleaded in bar to all those said several causes of action. So other special causes of demurrer pleaded with much prolixity. This modern prolixity, so often seen in England, in assigning the special causes of demurrer, has probably arisen from three causes: 1. The last statutes of amendment and jeofail, which direct all defects in form to be specially point- 2 Bos. & P. 427, Gray, ex'r. v. Pin-dar.

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6 Mass. R.  
Martin v.  
Wood.

Kent v. Kent.

2 Mass. R. 81,  
Perkins, jun.  
v. Burbank.

2 Mass. R. 98,  
Kellogg v.  
Ingersoll.

Mitford's  
Pleadings,  
several  
places.

Mit. Pl. 102,  
114.

ed out, as causes of demurrer, to avail the party taking the exception: 2. A strong inclination in many pleaders to overload their pleas with matter and words, thinking they have force and weight in proportion as much matter and many words are crowded into them: 3. Many fees being according to the number of lines.

§ 8. First plea, *nul disseizin*: second, demandant never seized. Demurrer, because nothing is contained in it (second plea) but what is involved in the general issue, before joined. This cause of demurrer is concisely and well assigned, and so in the American cases generally, are the causes of demurrer, more concisely and better assigned than in the modern English cases; for instance in *Kent v. Kent*, 2 Mass. R. 338, 358, all the various defects in an old defective common recovery in matters of form, and all the differences between that recovery and a writ of entry *sur disseizin in the per*, are stated under seven heads, clearly and distinctly, in fewer words than are used in *Jones v. Kitchen*, in pointing out the defects of a very short plea. But 2 East, 262, the causes are concisely assigned.

§ 9 In this case, deft. demurred to the plt's. replication; because 1st, It was a departure, and did not maintain the declaration or any part of it, except the first count: 2. It was not a full replication to the deft's. plea, which answered the whole declaration: 3. It did not set forth the name of the said pretended witness, as by law it ought: 4. It concluded with praying judgment if the plt. shall be precluded from maintaining his action as to all the counts in the declaration, when having replied new matter respecting only one count, he should have prayed judgment whether he should be precluded as to that only: And 5. it admits the plt. is properly barred, by said plea, of his action as to all the promises supposed in the said declaration, excepting that mentioned in the first count.

§ 10. So in this case the causes of demurrer are concisely and correctly assigned thus; viz. the deft. has neither confessed nor denied the existence of the said road: 2. That the plea concludes to the country, when it ought to conclude with a verification; that it offers to put in issue to the jury, matter of law not proper for their recognizance; and that it is an insufficient answer &c.

§ 11. *Demurrer in equity to bills*: Must be for some matters on the face of the bill: May be to the whole bill, or to a part; or several demurrers to several parts, and one overruled and another not.

§ 12. Causes of demurrer in equity. *Because* the case is not within the court's jurisdiction: because the sum is be-

low the dignity of the court; Mosely 47: *Because* the plt. may have remedy at law; 3 P. W. 397: *Because* the plt. is a minor, or idiot, or lunatic, or *non compos*, or a *feme covert*, &c., and sues alone, and no next friend &c. is named in bill, (goes to the whole bill, whether for relief or discovery.) *Because* the plt. has no interest or title in the subject matter of the suit: *Because* the plt's. case, as by him stated, does not shew he has any right to call on the deft. for a discovery; Mit. Pl. 151: *Because* the plt. shews no right to the relief he prays for; 144: *Because* the plt's. bill is insufficient to answer the purpose of complete justice; id.: *Because* the plt's. bill does not state a case in which equity can compel a discovery; 149: *Because* there is no privity of title or interest between the plt. and deft.; 154: *Because* the bill improperly confounds distinct subjects: *Because* the plt. demands by one bill, several matters of different natures against several defts.; Hard. 337: *Because* the plt's. bill shews no claim of interest in the deft.: *Because* the discovery prayed for is immaterial: *Because* the deft. is so situated that it is improper for the court to compel a discovery; 1 Eq. Ca. Abr. 131: *Because* the plt. has remedy by *mandamus*, and not in equity; Id.

§ 13. *To bills of revivor.* *Because* the plt's. bill does not shew sufficient cause for reviving the suit, or any part of it: *Because* the plt's. bill is to revive as to costs only to a supplemental bill: *Because* the plt's. supplemental bill is brought on matter that arose before the original bill was filed, and when his suit was in that state in which his bill might have been amended: and *because* the plt's. supplemental bill is brought against a person who was no party to the original bill, and who claims no interest in the matters in dispute.

ART. 5. *What is confessed, or not, by demurrer.*

§ 1. Generally all facts formally pleaded at common law; but it was not a confession of the matter badly alleged in the declaration &c., in substance or form; nor matter repugnant or impossible, and the ground of the demurrer. So a thing not material or traversable was not confessed by the demurrer, when it was not traversed; and since 27 El. c. 5, which enabled the judges to give judgment according to the right of the case, not regarding imperfection or want of form, except especially stated as cause of demurrer, a general demurrer confesses all matters substantially well pleaded, though not formally. That is not according to the forms by this law intended; for such forms are now immaterial, when the want or imperfection of them is not specially expressed in the demurrer; but since the statute, a demurrer does not confess any matters informally pleaded, or imma-

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Mit. Pl. 135,  
136, 137, 141.

Mit. Pl. 146.—1  
Vern. 416.

3 P.W. 312.—  
Mit. Pl. 154,  
157.

2 P. W. 348,  
164, 165.—3  
Atk. 817.

Com.D.Pl. Q.  
5, 6.—1 Sid. 10.  
—Salk. 561.  
27 El. 5.—  
Hob. 232,  
233.—Yelv.  
195.

CH. 181. terially, if the defects or informallities be pointed out as  
 Art. 5. causes of demurrer. As to such matters so pointed out, the  
 statutes of amendment and jeofail make no difference; and  
 in this particular mode many errors may be taken advantage  
 of that cannot be in any other way, or in any other manner  
 of exception. Even the addition of surplusage when spe-  
 cially shewn for cause of demurrer, will in some cases, make  
 the pleading bad, though the general rule is, that mere sur-  
 plusage will not vitiate the pleading.

Lutw. 1467.

§ 2. So in Ch. 180, a. 10, s. 5, *Goram v. Sweeting*, plt. by  
 demurring to the deft's. plea, confessed he, the plt., had cut  
 the one thousand trees.

Cro. EL. 829.

§ 3. So in covenant, the deft. pleaded, covenants perform-  
 ed, and the plt. assigned a breach; deft. demurred; he con-  
 fessed the breach, though he contradicted his plea.

6 Com. D. Pl.  
 Q. 5.

§ 4. So in debt on bond to pay if A died without issue,  
 then living. Deft. pleaded that A died, having issue, at B.  
 Plt. demurred for want of a good venue; he confessed  
 thereby A had issue living.

5 Com. D. Pl.  
 Q. 5, *Rex v.*  
*Neal.*

§ 5. So an information *quo warranto*, for exercising an of-  
 fice of public trust; to this the deft. demurs, and so confes-  
 ses it, then he cannot except, and say, it is not such an  
 office.

2 Mod. Cas.  
 371.

§ 6. So in debt on bond to pay &c. within twenty days  
 after the return of a ship, or at the end of eighteen months.  
 Plea, the ship returned within eighteen months, and deft.  
 paid within twenty days after. Plt. traversed the payment;  
 to this the deft. demurred. Held, this demurrer confessed  
 the breach plt. laid, and he recovered.

6 Com. D. Pl.  
 Q. 6.

§ 7. But a demurrer to a bad count, plea, replication, &c.  
 does not confess it.

1 Sid. 10.

If the replevin be for a taking in a place in A, and the  
 avowry be for rent in B, and the plt. says, that B is within  
 A, a demurrer thereto is not a confession of the matter  
 which is repugnant and impossible, and the ground of the  
 demurrer.

*Remark.*—In the last eight preceding chapters respecting  
 pleadings in general, and in an appropriate sense, the reader  
 will observe there is much ancient law, and many ancient  
 authorities cited; all of which is not of frequent use in mod-  
 ern pleadings. But still the whole is a part of our law of  
 pleadings; and some of the best of it too; for two reasons:  
 1. The whole is accurately and concisely expressed in true  
 legal style: 2. It was produced when eminent lawyers spent  
 their lives, in a great measure, in the science of good plead-  
 ing. One reason it is not of frequent use, is, but few law-  
 yers now have the old books in which these ancient plead-

ings are found; another, they are recorded in those repelling languages, Law French, and Law Latin, much abbreviated, and in an uncouth black letter. But no attentive lawyer can read the American reports with care, and not observe how our most eminent judges and lawyers, possessing large libraries, rely continually on the ancient authorities, especially in their pleadings, whenever an important cause turns on points in pleadings. To this purpose are hundreds of cases in Massachusetts, New York, Pennsylvania, and especially in Virginia. In fact, as the English common law, which is our common law in substance, came into existence, and was settled in ancient times, the genuine evidence of that law, what it is or is not, are ancient authorities, the ancient pleadings and reported decisions; and so is this law well understood in Virginia, where it is better preserved than in any other State in the union; hence, in Virginia, British authorities, pleadings, and decisions, since 1776, are viewed as no evidence of that law, but as they illustrate the old decisions at common law made before, that is, before our revolution. By common law is meant the common law adopted in our colonies.

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## CHAPTER LXXXII.

## TRIALS.

ART. 1. *Trials of several kinds.*

§ 1. *General principles.*—Our trials of any importance are by *record*, by *jury*, and by *witnesses*. By *witnesses* in a few cases, by *record* in more, but mostly by *jury*, whose verdict must be good in *substance* and *form* in all cases; but it may be *special* or *general*, on the issue on the *title* or *right*, or on a mere *inquiry of damages*. The English mode of trial by *certificate* or by *inspection* are but very little in use here; and our trials by the oaths of the parties are rare in this state.

§ 2. *Antiquity of juries.* Juries were in existence long before the conquest; as all assizes were to be tried by *twelve good and lawful men*, and they existed by the general custom or the common law; were anciently of the *vicinage*,—but by 4 and 5 of Anne, Ch. 16, the jury of trial comes from the body of the county. Juries were adopted among the earliest Saxon colonies in England, and among all those nations who

3 Co.—Pre-  
face Dr. &  
Stud. 24.3 Bl. Com.  
349.

CH. 182. adopted the *feudal* system in Germany, France, &c. the people of England, our ancestors, have faithfully preserved this favourite feature, the jury trial, in all their changes of government, and in *magna charta*, it is particularly recognized and secured, as essential to liberty; and Ch. 29 says, "that no freeman shall be hurt in either his person or property, but by the legal judgment of his peers, or by the law of the land."

Mass. C. & P. Laws, 144 to 147.

§ 3. This *jury trial* our ancestors brought from England with them, and has existed in the United States from the first settlement of the country, with the exception for a short time in the colony of New Haven. It was regulated by the Colony law of Massachusetts, passed in 1646, and among other things the jury was to find the matter of *fact*, and *damages and costs according to the evidence*; and the judges were to determine the matter of *equity*, and to declare the sentence of the law; also, to direct the jury to find according to law.

6 Cranch. 8, Field v. Holland; and 148.

§ 4. And our Federal courts admit of jury trials in equity, and they may often direct an issue even after auditor's report. In a trial a judge may refer the jury to their own knowledge of any particular facts which have been proved, as matter of illustration only, not as evidence; 4 Maule & S. 532.

#### ART. 2. *By constitutions.*

§ 1. By the constitution of the United States, article 3, section 2, "the trial of all crimes, except in cases of impeachment, shall be by jury;" and by the 12th article of amendments to the said constitution, it is provided: "In all suits at common law, the right of trial by jury shall be preserved;" and in the 11th article of said amendments, it is provided, that not "any fact triable by a jury according to the course of the common law shall be otherwise examinable than according to the rules of the common law." By the 10th article of said amendments, the jury in *criminal* matters must be unanimous.

§ 2. *Massachusetts constitution,—declaration of rights.* 12th article adopts the 29th article of *magna charta* nearly, to wit: "and no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers or the law of the land;" "and the legislature shall not make any law that shall subject any person to capital or infamous punishment, except for the government of the army or navy, without trial by jury;" and 15th article, "and in all controversies concerning property, and in all suits between two or more persons, except in cases in which it has been heretofore otherwise used and practised, the parties have a right to trial by

jury ; and this method of procedure shall be held sacred, unless in causes arising on the high seas, and such as relate to mariners' wages, the legislature shall hereafter find it necessary to alter it."

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§ 3. This jury trial ever having been in high esteem, most other modes of trial have yielded to it, in all parts of the United States.

As the constitution and laws of the United States regulate juries in the Federal courts very much according to the laws of each state, it may be useful to state the substance of the statutes in Massachusetts, more permanently in force on this subject, in regard to the jury of trials. This act of congress provides, section 29, that "Jurors in all cases to serve in the courts of the United States, shall be designated by lot or otherwise, in each State respectively, according to the mode of forming juries therein, now practised, so far as the laws of the same shall render such designation practicable by the courts or marshals of the United States;" and act May 13, 1800, like juries in the highest state courts.

Act of Cong.  
Sept. 24,  
1789, sec. 29.

ART. 3. This act (the Province law in substance revised) provided that the selectmen of each town should keep two jury boxes, and should once at least in every three years lay before the town, on penalty of £3 each, to the use of the county, a list of such persons therein "as are of good moral character, and qualified, as the constitution directs, to vote in the choice of representatives, and not exempted by this act, and such as the selectmen shall judge well qualified to serve as jurors;" and the town shall select out of the list one quarter part best qualified to serve at the Supreme Judicial Court, and have their names written on separate pieces of paper, and put into one of the boxes, to be drawn out to serve at the Supreme Judicial Court; the town to direct such of the remainder of the list as they thought proper to have their names written on separate pieces of paper, and put into the other box, to be drawn to serve at the courts of common pleas and general sessions of the peace (county courts), and if any person whose name was put into either box, should be convicted of any scandalous crime, or be guilty of any gross immorality, his name was to be taken from the box, but might be restored by a vote of the town; said boxes to be kept by the town clerk; and it was made the duty of the clerks of the several courts to issue a *venire facias* for jurors to serve at their respective courts, thirty days at least before the return day, directed to the constable of each town in the county, as the court might order; and the constable to notify the freeholders and other inhabitants qualified to vote in the elections of representatives to meet six days before the court, and be

Mass. Act,  
June 26,  
1784, as to  
juries of trial.  
—Maine Act,  
Ch. 84 pp.  
304, 312.

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present at the appointment of the jurors called for; town clerk to draw from the proper box, the numbers &c.; and the town had power to excuse one drawn &c.; and no one was held actually to serve oftener than once in three years, and paying a fine was equal to serving; jurors to be notified to attend at court by constables, at least four days before &c., by reading the appointment, or by leaving notice at their houses. If a want of jurors at any court, it may issue a *venire facias* to have the number made up immediately; and when from challenge, or otherwise, there shall not be a jury to determine any civil or criminal cause, the sheriff, or his deputy, or, if interested, the coroner, or such disinterested person as the court may appoint, shall return *talismen* &c., provided there be seven jurors returned on the *venires*. If the constable neglects his duty, he forfeits not exceeding £10; like selectmen or clerk £5. If a juror neglect to attend £2; in Boston, Salem, or Newburyport, £5; these fines to the use of the jurors who attend. The judges on motion of either party may put any juror "on oath, whether he is any way related to either party, or hath directly or indirectly formed or given any opinion, or is sensible of any prejudice in the cause"—and if not indifferent, another must be put in his place, the sheriff to forward the *venires* as soon as received. In all causes relating to the realty, either party may have a jury to view the place, if the court think proper &c.; persons exempt from serving as jurors, were, by this act, settled ministers, qualified justices of the peace; practising attorneys; sheriffs, deputy sheriffs, coroners, and constables; wardens, registers of the courts of probate; registers of deeds; the clerks of the common law courts; physicians, ferrymen, and millers; this is nearly the old law, always in force in the colony, province, and state.

§ 2. As to jurors in forcible entry,—as to ways, and as to flowing lands, and coroner's inquisitions, and which are special juries summoned on each occasion, and assembled on the spot, see those heads respectively.

Mass. Act,  
June 26,  
1784, as to  
grand-juries.

This act (the old law revised nearly) provided that thirty days at least before the sitting of the Supreme Judicial Court in each county, the clerk should issue his warrants to the constables of the towns in the county, or so many of them as the court ordered, to assemble the freeholders &c. qualified as above, to choose, by ballot, so many good and lawful men of like qualifications, and of good moral character, as the warrant required to serve at said court. Notice to serve &c. much as in the other act. The act prescribed the form of the grand juror's oath, and certain penalties for neglect of duty, by those concerned in executing it, on the principles in the

other act ; also provided the sessions' clerks forty days, at leest before the first of March yearly, issue their warrants to the constables of the several towns in the county, or as many of them as the court ordered, directing them to assemble the freeholders &c. qualified as above, to choose by *ballot* the jurors required, qualified as for the Supreme Judicial Court, to appear at the court to be holden next in the county after the first of March, to serve *throughout the year*, and until another grand jury should be qualified,—notice &c. And the act made it "the business of said grand jury to present all crimes, offences, and breaches of the law, cognisable by said court ;" same oath as in the Supreme Judicial Court ; fines fixed for neglect of duty by all concerned in executing the act ; among others the town, a corporation, forfeited a fine of £20, or not exceeding that sum ; by the fee bill of 1786, foreman 4s. a day, each other grand juror 3s. 6d., and 2d. a mile travel ; (this shews the value of money at that time. Twelve grand-jurors at least must agree to find a bill, and necessary it consist of from twelve to twenty-three. A. D. 1811, decided in the general court in Virginia, that if one be appointed under an act of congress to take the *census* of his county, it does not disqualify him to be a grand-juror in a state court. Virginia Cases, 186, 188.

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This act provided that grand-jurors be drawn from the box of the Supreme Judicial Court ; and if one served as a grand-juror, it excused him serving as a petit juror only at that court &c. ; and if any clerk or selectman was guilty of any fraud, he forfeited £10, half to the state, and half to the prosecutor. If the person drawn was beyond sea, or out of the state, another might be drawn ; and the town might agree on the mode of assembling the inhabitants to choose &c.

Mass. Act,  
Feb. 26,  
1794.

§ 4. This act was a revision of the whole subject of grand, traverse, and petit jurors, and repealed all previous jury acts ; and in about a dozen pages re-enacted most of the old provisions, and added some new ones ; as empowering courts of sessions to divide counties into districts ; enlarged the lists of exempts, by including loan and revenue officers ; the selectmen to draw ; limited the age to seventy ; names of jurors to be alphabetically arranged, and each jury to elect its foreman, and he empowered to swear witnesses ; and made provision for *provisional* jurors in the first instance, as the court might direct, or a second set to serve part of the term, and every juror allowed 7s. 6d. a day—six cents a mile travel out and home ; rather more than double the allowance twenty-four years before, such was the depreciation of money. This act repealed the 1st section in the act of 1808, and provided for *one jury box only*, and the former exemptions,

Mass. Act,  
March 12,  
1808.

Mass. Act,  
Feb. 17, 1813

CH. 182. and added to the exempts some few; and each town to keep in its jury box, one juror at least, for every sixty persons, according to the next preceding census. Jurors cannot be

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3 Salk. 81. challenged in writs of inquiry. Nor can the king withdraw a juror where the punishment is *infamous*.

ART. 4. *Some particular principles as to jurors and trials.*

2 Stra. 804.—

3 Bl. Com.

382, 384, 381.

§ 1. Judge Blackstone observes, there are four defects in the jury trial: 1. Want of discovery by the party's oath: 2. Want of a provision to compel the production of papers and books: 3. Want of power to take depositions abroad: 4. The local feelings of the jury in some cases. The second and third our Federal laws remedy. There is in the United States, no such jury as the *grand assize*, or a jury *half aliens*, at least but in a few States; nor the grand jury of attain of twenty-four; as our jurors in Massachusetts are drawn, the challenge to the array does not apply. After the jury of trials has heard a cause and retires, it is kept together by an officer, who is to allow no person to speak to them till they are agreed in any cause. They must be kept together without meat or drink, till agreed, but by leave of the court. They may propose questions to the judge or judges; and may ask a witness a question after retired from the bar; but this must be done in open court: must in all cases be unanimous. If the jury say, they are agreed, the court may examine them by poll. A jury charged in a capital case, cannot be discharged without the prisoner's consent, till they have given their verdict. Anciently the jury was allowed to regulate their conduct by their own private knowledge, but now the practice is, if a juror knows any thing, to swear him as a witness. Persons on the grand jury, who found the bill, may be on the petit jury, or jury of trials. A juror cannot be examined in any matter criminal, in order to challenge.

3 Bl. Com.

375.—See

Ch. 222.

1 Salk. 455.—

5 Bac. Abr.

292, 293.—3

Bl. Com. 376.

—12 Mod.

305.—1 Salk.

163.

3 Bl. Com.

330.—1 Salk.

152.—Salk.

338.

§ 2. Trial is the examination of the matter of fact in issue, and varies according to the subject, as stated in the next article. Where there is a challenge to the favour, and the practice is to have triers, their oath is, "you shall well and truly try whether A. B. (the juror challenged) stands indifferent between the parties in this issue."

1 D. & E. 41,

Vazee v.

Delaval.—2

D & E. 281.

—4 Johns. R.

487.

§ 3. The better opinion seems to be, that a juror cannot by affidavit, disclose misconduct in the jury of which he is one; as that they tossed up, and the *plt.* won; as such conduct is a high misdemeanor in the juror himself, and the information must come from some other source, but may, to support their verdict, or to exculpate jurors.

Farr. R. 99,

Queen v.

Sturney.

ART. 5. *Trials.* Whenever a statute makes an offence, and is silent as to the mode of trial, it shall be by jury, according to the course of the common law. As the law arises

from the facts, these in every case must be truly stated, or found by the jury, before the question of law can arise thereon; and in every case disputed, there must be some mode to ascertain the facts. This mode is some sort of trial, of which in England seven are reckoned; and six in America: as 1. by record: 2. By inspection: 3. By certificate: 4. By witnesses: 5. By Jury: and 6. by oath of the party, as in usury &c.; and in England, a seventh may be added, by battle and wager of law.

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3 Bl. Com.  
330 &c.

§ 1. *Trial by record.* This is only where a matter of record is pleaded as a judgment &c., and the other party pleads, "no such record," and the first pleader says, "there is such a record," "and this he prays may be inquired of by the record, and the other party doth the like;" and day is given to the party pleading the record to bring it in; and if he at the time appointed fails, judgment is given against him; and a record is of so high a nature, that if it be pleaded that there is no such a record, it can only be tried by the record itself. If an alien friend or enemy, shall be tried by treaty &c., which is of record. So if one be sheriff, or justice of the peace, or attorney, this matter shall be tried by the record; but whether a writ has been sued out or not, by jury; for until it is returned it is not entered on record; and whether the deft. appears generally, by the record; but if on a certain day, by the jury: if J. S. be under-sheriff, by the jury: so if J. S. was arrested on *non est inventus* returned, by the jury: if matter of record be laid only by way of inducement to a matter of fact, by the jury: so if a decree in a chancery was made, by a jury.

3 Bl. Com.  
331.6 Bac. Abr.  
218, 219.

§ 2. *Trial by inspection or examination* is, when the matter in issue, being evidently the object of sense, the judges decide on their own view, or by examination of witness; as whether one be a minor, they view him, and if then in doubt examine him on the *voir dire*, his mother &c.; as whether the party who appears as plt. be the real plt. or not: so if one be an idiot or not: so if a wound be *mayhem* or not, and may examine the surgeons &c.; as whether the tenth day of the month, for instance, in a past year, was Sunday or not, may be decided by an inspection of the almanac: so on a grievous battery alleged, may inspect the wounds &c., to see if they support the declaration, and thereon give additional damages; but in all these cases, if the judges doubt, they may call a jury; and a jury in all cases, shall try the question, whether a minor or not, unless the validity of a judicial act depend thereon; and generally, if a minor do an act in *pais*, his minority shall be tried by a jury: if in court, by the judges by inspection, so long as he remains a minor. To

3 Bl. Com.  
331 to 333.1 Inst. 380.—  
5 Bac. Abr.  
220, 221.

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3 Bl. Com.  
338, 335, 336.

make an attorney is an act in *pais*: to enter into a recognition, is an act in court.

§ 3. Trial by certificate, is allowed when the evidence of the person certifying, is the only proper evidence of the point in dispute; as a marriage, shall be tried by the judges on the certificate of the bishop. So the practice and customs of court shall be tried by certificate from the proper officer or officers; and what return was made by a sheriff, or officer, shall be tried by his certificate: so births, deaths, and marriages, by certificates from the proper recording officers, as by statute law established in this and other States; but in all cases the certificate must positively certify the fact, not the evidence; but if it so certify the fact, and also the evidence, and that is insufficient, it is well; for the insufficient evidence is but surplusage. See Evidence, Ch. 82, Certificates.

5 Bac. Abr.  
22.—Cro. El.  
787.

5 Bac. Abr.  
226.

3 Bl. Com.  
336.

§ 4. Trial by the judges on examination of witnesses; as challenges; or whether a piece of written evidence was delivered to the jury after they went from the bar; whether the husband of the plt. in dower, be alive or not; whether a fact happened beyond sea, &c. &c. This trial by the judges by examining witnesses, is the only mode of trial known in the civil law; and here there must be two witnesses.

§ 5. Trial by jury; see Jury above. The mode and manner of trial by jury is ever, in one sense, the same, or ought to be, that is, always on an issue joined by the parties. In another sense it varies exceedingly, according to the nature of the case, and the pleadings. The object here is to state very briefly a few cases. A man may by the manner of making his contract, subject himself to summary process. Bank of C. v. O'Kely.

5 Bac. Abr.  
217, 226.

Shewing what the jury shall try, and what the court. It is an established general rule, that to the question of law the judges shall answer; to the question of fact, the jury. The judges shall decide the meaning of a word in a statute. Executors and administrators may remove the deceased's goods from his house in a reasonable time, and the judges shall decide what is reasonable time. If the existence of a general custom (part of the law) be questioned, the judges shall decide it; but as to the custom of a particular place, the jury. A question as to the legal effect of a deed shall be tried by the judges; but the question, if the deed was sealed and delivered, by the jury. So whether a rasure or interlineation was made in a deed before the delivery, by the jury; but the question, if the rasure &c. be of a matter

material, by the judges ; and so a question as to the practice of the court. CH. 182.  
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"If an agreement be in general terms, that a certain fact shall be proved, the general rule is, that it be tried by a jury." This being the most legal way of proving a matter of fact ; but if a particular manner of proving be agreed on, that must be pursued. If to be proved before J. S., it must be by witnesses examined by him. Though the agreement be in general terms, to prove a fact, yet if from circumstances it appears a proof to a jury was not intended, it may be in some other mode ; as where the agreement was to prove a fact in two days, it could only be intended from the shortness of the time, not to be to a jury ; and if necessary to prove a fact to a jury, it need not be in a previous action ; as where J. S. promised J. N. to pay him £3, on his proving a certain cock won the battle ; J. N. sued for the £3 ; and held sufficient for him to prove this in this action. 5 Bac. Abr. 226, 227.

*As to the party's intention.* The general rule is, that the party's intention in doing an act, is to be tried by the judges, as not being a question of fact ; "but if the question do not depend on an act alone, but upon an act as being coupled with a criminal intent, the intent as well as the act, must be tried by the jury." If the question be, whether the intent of the deft. was to carry wood to Calais, which had been put by him on board a ship, the intent must be tried by a jury. So the jury must decide with what intention the deft. spoke certain words of defamation. Where and how a juror may be challenged as to interest. 14 Mass. R. 215 ; 1 Cain. 37. 5 Bac. Abr. 227. H. P. C. 229.

The challenge of a juror may be retracted in a trial, and the juror may be sworn ; and the right of challenge of thirty-five jurors peremptorily, at common law, in a capital case, remains in all cases, not mentioned or specified in the act of Congress of April 30, 1790 ; and it is cause of challenge if the court direct the sheriff, to take a jury from any particular part of the county, where there is no statute enabling the court so to do. It is a good cause of challenge to a juror, that he has given his opinion on the question to be tried : so that he is an inhabitant of the town which is to have a part of the penalty. He must be free of all manner of exception. To try an alien, no cause of challenge in New York, the jury is *de medietate linguæ*. Aliens though freeholders, are not "good and lawful men," and may be challenged ; but it is too late to object to the alienage of a juror after verdict ; but it is not a good cause of challenge if a juror say, if what neighbours say is true, the plt. was right and deft. wrong. Is cause of challenge, if a juror be an 2 Dallas, 382.—7 Cranch, 290.—4 Dallas, 413, 414.—1 Johns. Ca. 237.—2 Dallas, 252.—2 Cain. 179.—2 John. R. 381.—6 Johns. R. 332, 4 Dallas, 353.—8 Johns. R. 445, Wood v. Stoddard.

CH. 182. inhabitant of a town, the poor of which has half of the penalty. 2 Johns. R. 194; 1 Id.

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ART. 6. *Verdicts.*

5 Bac. Abr.  
284.

§ 1. A verdict is the jury's finding the matter in issue, and may be absolute, or *de bene esse*, or *conditional*, that is, to stand if the court be of opinion the verdict ought to have been found: debt against *baron and feme*, and at the trial she was defaulted, and a protection cast for her; the jury may find *de bene esse*, and if the protection shall afterwards be disallowed, the verdict shall stand: though the jurors must all agree in the verdict, they need not in their reasons for it; 5 Bac. Abr. 290. A verdict is *public* or *privy*,—the latter is of no force, unless affirmed by a *public* one in a court, and a verdict is in open court in whatever place the court adjourns to. Libel on A, B, and C, is not broved by a verdict on A and B.

3 Bl. Com.  
377.

2 Bin. 514.—  
3 Bl. Com.  
377.

§ 2. So the jury may find a general or a special verdict; the special verdict is grounded on 13 Ed. I., c. 30, and in this they state the naked facts as they find them to be proved, and pray the advice of the court thereon, concluding conditionally, that if upon the whole matter the court shall be of opinion that the plt. had cause of action, then they find for him; if otherwise, then for the deft.; or the jury may find a special case, and species of a special verdict; that is, find for the plt. subject on a matter of *law* to the opinion of the court; or the jury, if they please, may *decide law and fact*, and give a general verdict in all cases; 4 Co. 1 to 16, Dowman's case. If in a general verdict, the jury mistake the law, they incur no penalty or blame if they follow the judge's opinion in matter of law; and the jury may well find a general verdict in every case where the judge settles the question of law, and directs them to find such verdict. If, however, not satisfied with his opinion in a doubtful matter of law, they may find a special verdict. In this State there are no formal minutes of a special verdict, as in the English practice; but here the special verdict is either agreed by the parties, and signed by the foreman of the jury; or if the parties do not agree in the facts, the jury finds them specially, having settled them by themselves, or by the assistance of the court, or the parties, or both, the foreman signs the special verdict, as in Massachusetts Supreme Judicial Court; Fish v. Wheeler, Essex, November term, 1790; also in another case, Ordway v. Pillsbury, Essex, November term, 1794 &c.

1 Inst. 228.—  
4 Co. 54.—5  
Bac. 285.—3  
Bl. Com. 388.

5 Bac. Abr.  
287.

6 Bac. Abr.  
288.

§ 3. In England it is the better opinion the court cannot order a special verdict to be amended as to a matter of fact even with consent of parties; but the authorities are not uniform in this point; Strange, 513, 514, is contra, Mayo v.

**Archer**; where the court ordered such amendment on affidavit of the fact; but the point was not argued. If the facts are not well stated in a special verdict, the court will set it aside, and direct the special verdict must find the facts or custom directly, and not merely such facts and matters, evidence or circumstances, as the court may infer there from the fact. If the jury find a custom to grant an estate for three lives, this is bad, and only finding argumentatively a custom to grant an estate for two lives.

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Art. 6.

5 Bac. Abr.  
288.

§ 4. It is exclusively the right of the judges to determine the question of law which arises on any fact specially found by the jury; as if the question be whether there is a seizin, and the jury after finding a matter of fact specially, conclude with saying, there is a seizin; the court need pay no regard to the conclusion of the jury, but will decide on the matter of fact specially found, whether there be a seizin or not.

5 Bac. Abr.  
289.

§ 5. So whether a lease found be assets or not; and it is the special matter found in all cases, that makes the verdict.

Hob. 63,  
Foster v.  
Jackson.  
Cro Car. 22,  
Castle v.  
Hobbs.—5  
Bac. 289.

§ 6. Where a jury finds a deed &c. it ought to be found *verbatim*, unless lost, and then the substance proved, that the court may inspect the deed &c., and put a construction on it; and the court will always intend every thing that can fairly be intended in order to support a verdict; as where the deft. produced letters patent, and they found specially for him, if these were good, and for the plt. if they were void; the judges held them void, and then intended the plt. had a good title in all other respects, though no title was found for him.

§ 7. If the jury find matter against law, the justices will take no notice of it, but will decide according to the law; and as a special verdict is the saying of the *lay gens*, it is not to be considered strictly as pleadings are, which are formed *per peritos*; and in all special verdicts the judges will not determine on any matter of fact, but that which the jury by their finding have declared to be true; where the jury find the issue and *more*, it is good for the issue, and void for the residue; the court cannot give judgment on the *evidence of the fact*, but upon the fact only as it is found; but on facts found the judges may vary the computation of interest.

3 Mor. E.  
329, 334, 336,  
341, 361.

§ 8. If a verdict finds facts and concludes against law, the verdict is right, and the conclusion is bad.

1 Dyer, 106.

§ 9. The jury may alter their verdict any time before it is recorded by the court, and the last finding shall stand; and the court may send the jury back to reconsider their verdict before recorded, if any mistake.

5 Bac. Abr.  
290, 291.

§ 10. 2. *Modo et forma*, part of the traverse verdict; the rule is, that the words *modo et forma* are not often to be viewed as material.

5 Bac. Abr.  
311, 312, 313.

CH. 182.

Art. 6.

Co. L. 281.—

1 Cran. 312.

2 Roll. Abr.

702.

§ 11. *Cases.* If a feoffment be pleaded to be by deed, and be traversed, did not enfeoff *modo et forma*, and the jury find a feoffment without deed, the verdict is bad, for *modo* and *forma* are essential in this case to the issue. A verdict does not cure a mistake in the nature of the action. 1 Caine, 323, Purdy v. Deluse. In debt, for that the deft. was indebted to the plt. in 40s. for a horse sold to him. Plea *nil debet modo et forma*, and issue thereon. The verdict found the deft. was indebted to the plt. in 40s. for two horses sold to him. *Curia*, the verdict is bad, for the contract found differs from that on which the issue is joined.

2 Roll. Abr.

709.

§ 12. In replevin the deft. avowed &c. and made title by virtue of an *absolute* devise to him from J. S. of the place where &c.; the plt. replied, that J. S. did not devise to the deft. *modo et forma*, and issue thereon; the verdict found the devise from J. S. to the deft. on a *condition precedent*, and that the condition was performed when the devise was pleaded. *Curia*, the verdict is for the plt.; for as the devise to the deft. is a conditional one, and not an *absolute* one, it is not such a devise as is alleged by him; and a devise of an estate in *possession* is materially different from a devise of an estate in *reversion*.

6 Bac. Abr.

312.

§ 13. Matters in the above cases were adjudged material, because *so in themselves*, to the actions; not because the words *modo et forma* were inserted.

Co. L. 282.

§ 14. Trespass for taking the plt's. goods at a certain day and place. Plea, not guilty, *modo et forma*; the jury found the deft. guilty at another day and place. Judgment for the plt.; for the substantial part of the issue is found, and the day and place are not material.

Dyer 75,

Brugis v.

Warenford.

§ 15. Case for slanderous words. Plea, did not speak the words, *modo et forma*; the verdict found the deft. spoke not the same words precisely, but the same in substance. Judgment for the plt. Cro. Jam. 407. Ledenham v. Man.

6 Bac. Abr.

314.

§ 17. *Another rule*—If the verdict do not find the material matter in issue, with proper certainty, it is bad, for there is not any sufficient foundation for the court to give judgment on; otherwise, if only uncertain as to matter not essential to the gist of the action.

Mar. 97,

Jason v.

Andrews.

§ 18. In dower. Plea, the plt's. husband was never seized of the premises whereof she demanded dower, and issue; and the jury found him seized thereof, except so much as belonged to J. S.; verdict is bad, as it does not appear what part belonged to J. S., the court cannot know of how much to give judgment.

Cro. Jam.

653, Treswell

v. Middleton.

§ 19. In debt for several distinct sums, in all making £40. Plea, *nil debet*, if the verdict finds the deft. owed £30, and as

to £10 he does not owe; they must find which, and what, £10 he does not owe, that if sued therefor again, he may know how to plead. Trespass *quare clausum fregit*, the declaration charged that the trespass was committed in a certain acre of land (bounds of it set out). Plea not guilty, and issue thereon. The verdict found the deft. guilty in half of the acre, but *not in which half*, and assessed damages for the plt. *Curia*, as damages are to be recovered in this action, and not the *land itself*, the plt. may recover damages for a trespass in one half of the case, and it is not material in which half it was committed. So trespass for cutting down trees, the verdict found he cut down ten trees of the value of 6s. 8d. each. Held good, though the jury did not add the sums together, and find the precise sum.

CH. 182.  
Art. 6.

5 Bac. Abr.  
315.

§ 20. *Another rule*—If the matter in issue be not found expressly, the verdict is bad; it not being sufficient for the jury to find either evidence or circumstances from which the court may fairly infer the matter that is in issue.

5 Bac. Abr.  
315.

§ 21. *Another rule*—A verdict in a *transitory* action may find matter in another county &c. though a *venue* in every action must be laid, yet the *place* is not material in an action for a *transitory* trespass, and a jury of the county of A., where the action is brought, is bound to find the deft. guilty, though it appears in evidence the trespass was committed in the county of B. &c. In a trial in England, a verdict finding assets in Ireland is good; and every offence must be punished in the county in which committed; but if one steal in the county of A. and carry the goods into the county of B., it is theft in both, and he may be punished in either. If an action be brought in the county of A., and the general issue be pleaded, the jury of the county of A. may find a local matter in any other county, provided the matter be incidental to the issue joined in the county of A. Action for words in Bath (inferior court) spoken there by which he lost customers in Wilts county, Plea, not guilty; verdict guilty and damages one hundred marks. Judgment for the plt., and held in error, that the jurors in Bath might well assess damages for the loss of customers in the county of Wilts, for it is only for an increase of damages.

6 Co. 47,  
Dowdale's  
case.

And Haw. P.  
C. 89.—  
Hale's P. C.  
69.

Cro. Jam. 502,  
Boura v. Car-  
rington.

Cro. Car.  
570, Ireland  
v. Sackwell.

§ 22. If a verdict find a matter against a matter of *record* of *estoppel*, or *matter confessed*, it is so far bad and void; and so of a matter not avoided in pleading. As in *tort*, it is not to be expected a jury will always agree as to the amount of the damages, a middle sum may in some cases be right, obtained by averaging the sums put down by the several jurors, and though this practice may be abused, the court will not presume fraud unless the abuse appears.

5 Bac Abr.  
318, 319.

2 Dallas, 56,  
Coper-  
thwaite v.  
Jones & al.

CH. 182.  
Art. 7.

3 Cranch,  
270.—  
6 Cranch,  
268.

Kirby, 87,  
The State v.  
Green.—2  
Day's Ca.  
659.

2 Day's Ca.  
604, The  
State v.  
Woodruff.

Kirby, 166.—  
2 Day's Cas.  
381.—Kirby,  
436, Pettis &  
al. v. Warren.  
—3 Day's  
Ca. 491.—  
Kirby, 18.

Kirby, 279.—  
2 Caines' R.  
129.

Kirby, 407.

2 Day's Ca.  
483.

Kirby, 407,  
Apthorp v.  
Backus.—3  
Caines' R. 57.  
—See Ch.  
183, a. 6, s. 4.

§ 23. Though no struck or special juries in Massachusetts, and there are such in other states, as New York &c. 2 Johns. R. 211, 373; 1 Johns. R. 61, 313, 314; 4 Johns. R. 482, 491.

§ 24. A verdict which contradicts a fact admitted by the pleadings is not to be regarded; and a special one must find the abandonment was in reasonable time, or it is defective; nor does a verdict cure a mistake in the nature of the action; 1 Cranch, 332; after one *assumpsit*, how intended, 341.

ART. 7. *Cases as to juries in Connecticut.*

§ 1. The jury are the proper judges of the weight of evidence; hence, their verdict is conclusive. But the sufficiency of the declaration is not within their cognizance. Sanford v. Sanford.

§ 2. In a criminal case, if they cannot agree, the court may discharge them without the consent of the parties, and continue the cause. And 2 Johns. Ca. 275: or one withdrawn; 2 Caines' R. 100.

§ 3. *Challenges.* Is a good cause to a juror, that he has once before tried the cause; but not to the array, that one of the pl'ts. was clerk of the court, and had, without its special direction, issued his warrant to the constables of the town &c. to summons the proper number of jurors for the trial of the cause. It is not an objection to a juror, that he has founded and declared an opinion on a general principle involved in the cause; but is, that a juror married the sister of a party in another case depending on the same principle with the one in trial, though his wife be dead. So it is if he express an opinion in favour of either party, without the knowledge of the other, before impannelled: so it is if he be brother-in-law to the surety of a party to prosecute his appeal; nor can a juror be nearer related to a party interested in the suit than a judge &c.

§ 4. When a jury have given in a verdict on oath, and assented to it in court, they are estopped to say, they did not agree to it.

§ 5. Whether a transaction is to cover usury or not, is a question of fact for the jury to decide. So if certain circumstances prove the grantee's dissent to a conveyance. 4 Day's Ca. 395.

§ 6. *Modes of deciding by a jury.* They may decide by a major vote, and afterwards consent unanimously, and bring their verdict accordingly; but in New York, it has been decided, that if the jury, to ascertain the quantity of damages, agree that each juror shall set down such sum as he thinks proper, and they divide the aggregate by twelve, and take

the quotient for the amount in their verdict, this is irregular, CH. 182.  
and the verdict will be set aside. Art. 7.

§ 7. *And New York.* In this State, struck or special juries are allowed in important or intricate cases, on affidavit of the party, or other evidence; and if the action be for slander, the deft. must by affidavit deny the truth of the words. In the affidavit for a struck jury must shew wherein the cause is intricate or important, especially if any opposition be made. 1 Johns. R. 141; 2 Johns. R. 211, 373; 4 Do. 186, 591; 1 Johns. R. 315.

§ 8. Confessions of jurors as to their own misbehaviour, may be heard on an application to set a verdict aside, and as it seems, their affidavit. 3 Caines' R. 67.

§ 9. *Foreign juries.* If a town contribute to the expense of a suit, this is cause for one: so if the right of fishing is to be ascertained in a place &c. 3 Caines' R. 103.

§ 10. If a constable appear before a justice, as the plt's. attorney, he cannot serve process for a jury; and if he do, it is cause of challenge, but deft. may waive the objection. 10 Johns. R. 107.

§ 11. *Trial, commencement of.* Not one, if a justice barely inspect a note. Hence, this does not exclude a trial by jury before the justice, which must be demanded by a party before a trial commences. 1 Johns. R. 142.

§ 12. *Juries in Kentucky.* By this act of sixty-two sections, trials in criminal cases are regulated to judgment execution or outlawry. Grand juries in a superior court—where it has jurisdiction, the sheriff of each county before each term, “summons twenty-four of the most discreet house-keepers, residing within the limits of the jurisdiction of the said court, either within or out of his county, to appear at the succeeding court, on the first day thereof; and the said twenty-four house-keepers, or any sixteen of them, shall be a grand jury, who shall be sworn to inquire of, and present, all treasons, felonies, murders, and other misdemeanors whatsoever which shall have been committed within the limits of the jurisdiction of the said court;” and if a sufficient number do not attend the first day of the court, the sheriff summons, from the by-standing house-keepers of said description, so many as to form a jury &c. Kentucky act, Feb. 16, 1798.—Virginia acts revised, enacts several parts of the Common into Statute law. —This housekeeper must have a visible estate of £20; sec. 61.—Sec. 52. Juror in the Quarter Sessions, must have such estate of £10, and be of good demeanor — Like in all inferior courts; but the exception taken before sworn; sec. 64.—*Juris de medietate*

§ 13. *Jury of trials.* Summoned as aforesaid, or such of them as appear and be not challenged, together with so many good and lawful men of the by-standers, being house-keepers within the State, as will make the number twelve, “or if the whole array be challenged, twelve of such by-standers, shall be a lawful jury for the trial of a prisoner.” The State cannot challenge without cause. The prisoner, in *linguæ* allowed; sec. 55.

CH. 183. case of treason, may challenge, peremptorily, twenty-four  
 Art. 2. jurors; for murder or felony, twenty; and this number in  
 all criminal cases, except in the Courts of Quarter Sessions.

§ 14. *Grand juries at inferior courts.* These are on the principle above, except ordinary keepers, constables, surveyors of roads, and millers, are excluded, and except they are sworn to present all breaches of the penal laws, made within a year before.

## CHAPTER CLXXXIII.

### PLEADINGS.—NEW TRIALS.

ART. 1. *General principles.* After verdict found, and before final judgment, many matters in pleading may take place. A party may have leave to replead; may file a bill of exception; may have a new trial: judgment arrested. As a motion for any of these purposes comes after the parties have pleaded in order to form an issue; and have usually waived special demurrers for defects in form, and tried the merits, and a verdict is found, all which proceedings cure or aid many defects; usually a motion to any of the four purposes above cannot avail, and will not be allowed, but for some matter of substance, and because substantial justice is not done by the verdict.

#### ART. 2. *Repleader.*

§ 1. At common law, a repleader might be allowed before verdict or trial, because then a verdict did not cure an immaterial issue; but now it can be only after a trial, because the fault of the issue may be helped by trial, by the statutes of *jeofails*; but there are exceptions to this general rule, as below: 2. If a repleader be denied where grantable, it is error: 3. Judgment is that the parties replead, and they must begin at the first fault; and if granted where not grantable, is error. Salk. 579.

If the issue be joined on a fact, totally immaterial, or insufficient to determine the right, so that the court on finding, cannot know for whom judgment ought to be given, then after verdict, the court will award that the parties replead; as in assumpsit against an executor, he pleads, he, instead of the testator, never promised; or as in debt on a bond condi-

Salk. 579,  
 Staple v.  
 Hayden.

3 Salk. 121.—  
 4 Bac. 129.—  
 1 Burr. 301.—  
 6 Mod. 1.

3 Bl. Com.  
 395.—6  
 Johns. R. 1  
 to 5.—  
 Tryon v.  
 Carter, Stra.  
 994.—1 W.  
 Bl. 357.—1  
 Burr. 668.

tioned to pay *on or before* a certain day, and plea, payment *on the day*; for if found for the plt. it concludes nothing. But if it appear by the record that the party cannot better his case by a repleader, it will not be allowed. 3 Bl. Com. 395.

CH. 183.  
Art. 2.

§ 2. Information in the nature of a *quo warranto*, to shew by what authority he acted as mayor of Caermarthen. Fourteen issues were joined. In one by mistake the deft. set forth the swearing to be on a wrong day, and before wrong persons, (whereas his real swearing was in fact right.) The court tied him up to the swearing as pleaded and stated in the record, and verdict against him; (he stated his swearing as under a charter election, whereas it was under a *mandamus* election.) New trial denied, 294. But the rule was enlarged to shew cause why the verdict should not be set aside, and a repleader awarded; 295. Objected, that there was no fault in the pleadings; but that this was a defective title only; 298: and the court cannot notice the fact, otherwise than it is pleaded; 299: repleader awarded; 306. And Lord Mansfield said, the rule is, "that when the finding on the issue does not determine the right, the court ought to award a repleader, unless it appears from the whole record, that no manner of pleading the matter could have availed; 301. It appears the case can be amended. Is it not manifestly a slip?"

1 Burr. 292,  
Rex v. Phil-  
lips.—Re-  
pleader  
awarded for  
want of a  
good issue.  
Yelv. 196.

§ 3. Withdrawing a plea, and pleading anew, is a species of repleader; though not technically such; and may be considered here, as it often makes a formal repleader unnecessary. *Non est factum* withdrawn, and *infancy pleaded*.

1 W. Bl. 357,  
Olding v.  
Arundel.  
3 Wils. 20, 21,  
Dye v. Leth-  
erdale.

Demurrer joined in trespass withdrawn, on payment of costs, and pleading anew. Same, 1 Burr. 318.

§ 4. This was an action for taking cattle for taxes, and after the parties joined in demurring, and the demurrer was argued, the court allowed it to be withdrawn, and the parties to plead anew.

Mass. S. J.  
Court, June,  
1793, Tyler  
v. Peabody.

§ 5. Deft. allowed to withdraw *non assumpsit*, and plead a tender; also a demurrer, and plead the general issue; *non est factum*, and plead the statute of gaming, on rule to shew cause, but on payment of costs, and taking short notice of trial &c.: so not guilty, and to plead a justification; but not granted when to the prejudice of the plt. and to effect delay.

1 Wils. 177  
—3 Mor. E.  
312, 313, 318.

Leave to withdraw not guilty, and to justify, he was master of a ship, and the plt. made a mutiny &c.

1 Wils. 264.  
—3 Mor. E.  
314.—2 Wils.  
204, Weeks  
v. Wood.

Not guilty withdrawn, and allowed to plead a justification under a warrant.

2 Burr. 755  
Alder v.  
Chipp.—3  
Mor. E. 318

The plt. by his attorney's mistake in his replication, trav-

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CH. 183. ersed a lease under which he himself claimed, allowed to withdraw and reply *de novo*.  
A. t. 2.

Not allowed to withdraw the general issue, and plead the statute of limitations; because this act does not go to try the merits. Party not allowed to withdraw a sham plea, and to plead the general issue.

—2 Wils 253.  
—3 Mor. E.  
320.—2 Wils.  
369.

§ 6. *Repleader*.—Further rules and cases.

1 Burr 317.—  
3 Mor. E.  
315, 316.

*Trespas*. Several pleas and replications: 2. Demurrers to two of the replications. Demurrers argued, and deemed frivolous. A trial was had: not allowed to withdraw the demurrers, and plead to issue, on payment of costs. Court said, the motion was after trial, and without any favourable circumstance: was after verdict on the issue, and contingent damages found on the demurrer, which appeared of record, and not in paper.

Dougl. 396,  
747.

§ 7. A *quære* is made if a repleader is ever granted, where the issue is found against the party tendering it.

Cro Jam. 5,  
Cox v. Cogswell.

§ 8. Trover against *baron and feme*, for a conversion to her use by her during coverture. Plea, that they are not guilty: ill, because no tort was supposed in the husband. A repleader allowed, and made, that she is not guilty. 5 Bac. Abr. 296; 3 Salk. 305.

Cro. El. 539,  
Kemp's case.

§ 9. *Trover for trees*. Plea, making special justification and title. Replication, of his own wrong; and issue. Repleader awarded. This replication is where the deft. justifies by claiming an interest in the freehold to himself. Repleader after demurrer argued.

Cro. Jam. 239,  
Watson v.  
Thorpe, ex'r.

§ 10. Trespass against *baron and feme*. He justifies, for that the plt. assaulted the wife, and he came in her aid &c. She, by herself, pleaded, "of the plt's. own wrong." Replication, of her own wrong, and without such cause. Both issues were found for the plt. Moved in arrest of judgment, the trial was ill; for the wife by herself cannot plead. Repleader awarded; and held, the damages being assessed entire, all was ill.

Cro. Jam. 435,  
Holms v.  
Broket.

§ 11. Debt for £60, payable June 25. Plea, payment of said £60 June 20, according to the condition, and issue; and verdict, that he did not pay said £60 June 20. Repleader awarded.

5 Bac. Abr.  
297.

§ 12. *Non assumpsit* pleaded in trover. Repleader awarded after verdict.

Lev. 32, Sergeant v.  
Fairfax.

§ 13. Debt for rent against a lessee for years. Plea, that before any rent was due, he assigned the term to another, whereof the plt. had notice. Issue on the notice. Verdict for the deft. Repleader awarded; for the issue was on a matter not material. No costs on a repleader. Salk. 579. But *quære*.

2 Lev. 164.

§ 14. Issue, that he is guilty, *aliter, et alio modo*, and at another place, is uncertain, and a replader allowed. Stra. 23. CH. 183. Art. 3.

§ 15. It is a general rule, to award a replader, if issue be misjoined, or joined on an immaterial point, and not aided by 32 H. VIII. 1 Lev. 32; 2 Mod. 137, 140. But not if the trespass be confessed, though the issue be immaterial. If the plt. declares on a lease to A, said to be assigned to the deft., and he pleads A did not assign to him, and issue joined. Replader; for this issue is immaterial. 5 Com. D. Pl. K 18 — Cro. El. 883. —1 Salk. 173. —Stra. 847, Enys v. Mohun.

§ 16. Generally there is no replader after a discontinuance, in joining issue in a defective manner, or after a default. Mod. Cas. 3.

§ 17. No replader where the deft. pleads payment and acceptance in satisfaction of a debt on bond, and the plt. takes issue on the acceptance. Stra, 23, Hawkshaw v. Rawlings.

§ 18. In this case, it was made a question, if in any case the party who tenders an immaterial issue, which is found against him, can have a replader awarded on his motion. In this case the court said, "generally a replader will be ordered before or after verdict, when the court shall be satisfied that the fact put in issue, is irrelevant to the merits of the cause." 7 Mass. R. 312, Eaton v. Stone.

§ 19. After reversal, a cause is entered in the Superior Court for trial. Not necessary to replead, but the cause may be tried on the pleadings in the courts below. 4 Day's Ca. 141.

§ 20. Arrest and replader awarded, where the plt's. first count began in covenant and concluded in case: second count all in case. Deft's. plea, was to the first only. After a general verdict for the plt. 2 Stra. 814, Moore v. Jones. Not allowed in favour of him who commits the first fault. 3 Hen. & Mun. 388, Kirtly v. Dick.

#### ART. 3. *New trials.*

§ 1. A new trial is a rehearing of the cause by another jury, with as little prejudice to either party, as it had never been heard before; and may be granted any time before judgment. Dougl. 797. See Ch. 188, a. 4, s. 4.—2 Mor. E. 6, Rex v. Gough.

§ 2. "The granting or refusing a new trial must depend on the legal discretion of the court, guided by the nature and circumstances of the particular case, and directed with a view to the attainment of justice." "The present maxim being this, that in all cases of moment, where justice is not done upon one trial, the injured party is entitled to another." 1 Burr. 397 — 2 Mor. E. 65. —3 Bl. Com. 388.—1 Burr. 395.

§ 3. A motion for a new trial, says this authority, must be decided before a motion in arrest of judgment is made; and in this case a motion was allowed in arrest of judgment, after a rule for a new trial was discharged; and at any time before judgment entered. 1 Burr. 334 — Dougl. 745, Taylor v. Whitehead.

CH. 183. § 4. But in this case the motion for a new trial, and a  
 Art. 4. motion in arrest of judgment, were pending together and  
 both motions were embraced in one and the same argument.  
 7 Mass. R. 169, Riddle's case.

2 Mor. E. 60. § 5. There are many ways to set aside an erroneous judg-  
 —1 Burr. 393. ment or a decree, founded on depositions in writing, but  
 there is no other way except a new trial to correct the errors  
 3 Bl. Com. of a verdict; for attainments now are but a name, and as obse-  
 389. lete as trial by battle. But it is said, there can be no mo-  
 tion for a new trial after one in arrest of judgment. 2 Salk.  
 647. *Quare.*

2 Mor. E. 61. § 6. There were probably many new trials before that of  
 Ganston and Wood, which was A. D. 1655. 1 Burr. 390;  
 1 Ed. III.; 6 D. & E. 623, n.

3 Bl. Com. § 7. Early it was held, that the matter which avoided  
 389. the verdict should be entered on the *postea*, but since early  
 in the reign of Ch. II. new trials have been granted on affi-  
 davits.

2 Mor. E. § 8. There shall be no new trials in inferior courts, unless  
 309, 310, &c. for irregularity; as where a verdict is obtained by surprise.  
 —Stra 13.— Salk. 650; Dougl. 379; 1 W. Bl. 298; 2 Salk. 650.  
 Stra. 392, 499.

1 Wils. 57. § 9. The court will often refuse a new trial, where the  
 party can review or have a new writ.

3 Bl. Com. § 10. Strictly the jury ought not to hear a word of the  
 375 —5 Bac. cause, but in the presence of both parties in the trial, or re-  
 Abr. 292, 293. ceive a scrip of evidence but by their joint consent, or by  
 —11 Mod. order of the court, and the undue influence by him, for  
 141.—Cowp. whom the jury find, must vitiate the verdict; and the jury  
 597. must decide on the evidence given in court. New trials  
 ought to be but where substantial justice cannot be otherwise  
 done.

#### ART. 4. *New trials allowed.*

3 Bl. Com. § 1. For misbehaviour of the party towards the jury &c.;  
 387.—2 Mor. as if the plt. deliver an escrow to one of the jurors, before  
 E. 11, 15, sworn, and he shews it to the others; or if the jury re-ex-  
 Leed's case. amine the witness after they go from the bar; but not if a  
 —Stra. 643. party only desire a jury to attend.

1 Burr. 352, § 2. If the party obtain a verdict by fraud, stratagem, or  
 Anderson v. unjustifiable means; as where the plt. sold goods to the deft.  
 George.—2 and took in payment one Hopley's note to the deft., endorsed  
 Mor. E. 16, to him; the plt. gave Hopley time from day to day, and on  
 17, 18. his failure it became a question, if the plt. ought not to lose  
 the note for his neglect; if so, then he was paid. The plt.  
 sued the deft. for the goods sold, and as endorser of the note;  
 the deft. supposing the plt. would produce the note on trial,  
 gave no notice to him to do it. On the trial, the plt. proved  
 the goods sold and delivered, and refused to produce the

note, and as the note was the only evidence of the payment for the goods, the plt. of course obtained a verdict on this improper and unexpected suppression of the note. The court granted a new trial.

CH. 183.  
Art. 4.

§ 3. *For any gross misbehaviour among the jurors themselves*; as where, after the jury went from the bar, one of them went and brought a court roll, and said, he knew the matter, and was for the plt., and the other jurors, who before thought otherwise, submitted to his opinion, and found for the plt.: a new trial was granted. This roll was probably furnished by the party. But where the jury, after they go from the bar, and before they find their verdict, eat and drink *at their own costs*, they are fineable, but no new trial shall be allowed; otherwise, if they eat or drink at the expense of either of the parties; but this eating and drinking must be shewn before the verdict is given in; and may eat and drink by leave of the court.

3 Bl. Com.  
387.—2 Mor.  
E. 20, 21—5  
Bac. 243, 292;  
see a. 9. s. 15.

2 Mor. E. 20.

5 Bac. Abr.  
293.

If the jury carry with them from the bar written evidence which was given in the cause, and carry it away without the leave of the court, or consent of the parties, they are fineable; but no new trial will be allowed.

Salk. 645.—2  
Mor. E. 25.—  
5 Bac. Abr.  
243, 291.

A new trial shall be allowed if the jurors do not fairly agree, as if they draw lots for their verdict, or throw up at cross and pile; or if the foreman say, the plt. never shall have a verdict, produce what evidence he may; or if after they leave the bar, they re-examine a witness. Cro. El. 189; 5 Bac. 292.

2 Mor. E. 24,  
25.—Stra.  
642.—5 Bac.  
243.—2 Salk.  
645.

After a motion was made in arrest of judgment, two of the jurors by affidavit disclosed, that they cast lots for their verdict, and a new trial was granted. Salk. 647, and below.

Barnes, 441.  
—2 Mor. E.  
47.

§ 4. *For verdict against evidence, hard actions, and evidence both sides.* A new trial was denied, though the verdict was against evidence, because it was a *hard* action; Salk. 644, 647; and 3 Mor. E. 96; rarely granted in *hard* actions; 2 Salk. 648, Spakes v. Spicer.

3 Burr. 1306.  
—2 Mor. E.  
50, Smith v.  
Page.

New trial granted after evidence both sides. 1 Burr. 390; 2 Mor. E. 57; 3 Mor. E. 96; denied, 2 Stra. 1142.

Bright, exr. v.  
Fynon.

New trial was granted because the judge thought the verdict was against evidence. Barnes, 439; 2 Mor. E. 52; Stra. 1106, 1142; 5 Bac. Abr. 244. Though it be so, no new trial, if the plt. has received no injury.

Ashley v  
Ashley.—  
2 Burr 664,  
Dr. Barton v.  
Thompson.

New trial denied after a view, there being evidence both sides; 2 Mor. E. 52; and the jury might be influenced by the view; no new trial against equity; 2 Salk. 646.

New trials denied in several cases, there being evidence both sides, though the verdict be against the opinion of the judge, for it belongs to the jury to weigh the evidence, and

1 Wils. 22.—  
2 Mor E. 52,  
53, 97—2 W.  
Bl. 4221, Ay-  
lett v. Towne.

CH. 183. to determine which side preponderates; no new trial if the  
 Art. 4. verdict be for what is justly due.

New trial denied, though the verdict was against evidence, because the action was trifling, frivolous, and vexatious; another case, because in an action for a malicious prosecution, being of a criminal nature, *Norris v. Tyler*; *Marsh v. Bower*, 2 W. Bl. 851.

New trial granted, though evidence both sides, if the jury misconceive the law; as what was the acceptance of a bill; a consideration, or *nudum pactum*, in the case. 2 Mor. E. 69; also 3 Wils. 38.

If after the trial, it be discovered that some of the witnesses were interested; this is not in itself a sufficient ground for a new trial; but may have weight if the party moving have merit on his side &c.; where the foreman gave in the verdict, it was set aside, on affidavit of eleven of the jurors that they found otherwise.

§ 5. A verdict against the record, or against law, and no new trial against the equity of the case. Salk. 644. Motion for must be in writing, and state the reasons. Mass. R. 202.

No new trial for a slip in pleading when the merits have been tried.

New trial granted because the jury misconceived the effect of an indorsement on a bill of exchange, the words "or order" being omitted in the indorsement; so against law.

Verdict against law; new trial allowed, the jury supposing an assumpsit in law, excluded by an actual subsisting contract, where an end was put to the latter.

Verdict against law, a third new trial granted; the jury mistaking the demand made on the maker of a note.

Several counts—several debts. &c. Verdict right for the plt. on one count; wrong for the deft. on another count. Verdict set aside generally.

If one deft. be acquitted, and another found guilty, that deft. cannot have a new trial; for if the verdict be set aside, it must for the whole, and as to both; and the one acquitted be a second time in jeopardy; but the one acquitted may assent.

§ 6. Excessive damages. After a trial at bar, a new trial was granted for excessive damages in slander; *Stile*, 466; 3 Bl. Com. 387; 2 Mor. E. 198; Cowp. 230. In personal torts, the court will seldom grant one for excessive damages. Denied, 2 Mor. E. 200; denied, 201; may grant one in every kind of action; 5 Taun. R. 277, 442; but granted in assault, 226; refused in assault &c. 2 Wils. 205, *Huckle v. Money*; 1 Lev. 97; Palm. 314; 2 Wils. 244, 249, 405: but a new trial was granted in malicious prosecution; *Strange*, 691, *Chambers*

Wood r.  
 Ganston,  
 A. D. 1655.—  
 2 Mod. 150.

3 Burr. 1663,  
 Pillans & al.  
 v. Van Mei-  
 rops & al.—3  
 Wils. 38.

1 D. & E. 717.  
 —2 Mor. E.  
 101 to 109.—  
 1 D. & E. 717.  
 Turner v.  
 Pearte —5  
 Bac. Abr. 294.

3 Wils. 272.

2 Burr. 1216.  
 —2 Mor. E.  
 113 to 130.

D. & E. 133.  
 —2 Mor. E.  
 139.

1 D. & E. 167.  
 —3 Bl. Com.  
 387.

2 Burr. 1216.  
 —3 Mor. E.  
 178.

Stra. 814.—5  
 Bac. Abr. 240.

*v. Robinson*: refused in slander, the judge being inclined against it; 5 Bac. 248, *Boulsworth v. Pilkington*: refused in a case of criminal conversation; 5 Bac. Abr. 248; 2 Burr. 609, *Wilsford v. Birkley*: allowed in false imprisonment; Comb. 357; 5 Bac. Abr. 248, *Ash v. Ash*: refused in assault and false imprisonment; 5 Bac. 248; 2 Wils. 160, *Leman v. Allen*.

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After the same excessive damages are given in a second verdict, the court cannot grant a third trial. 2 Mor. E. 230; Salk. 649, *Clark v. Udall*; but 4 Burr. 2108, *Goodwin v. Gibbons*.

In cases sounding in damages, the jury are judges; 3 Wils. 18, 60: refused in a case of criminal conversation. In this action many cases were cited for and against granting new trials in cases of torts; but Buller J. was for granting a new trial, and said, there is no doubt but the court has power to do this in any case, and so are the authorities. The only power the court exercises herein is the sending the cause to a second jury for revision; may be in any case.

4 D. & E. 651 to 659, *Dublerley v. Gunning*.—7 D. & E. 529.—6 D. & E. 244.—1 D. & E. 277.

But for excessive damages in assault and battery, a new trial was granted; and Lord Kenyon said, the case of *Dublerley v. Gunning* was *sui generis*, and could not govern this case. In personal torts, the court but rarely grants a new trial for excess of damages; Cowp. 230, *Gilbert's case*; but may be for outrageous damages; 2 W. Bl. 942, *Sharp v. Bruce*, trespass against customhouse officers; and 2 W. Bl. 1327; 2 Wils. 252; 3 Wils. 18, Ch. 64, a. 2, *Chambers v. Caulfield*.

5 D. & E. 257, *Jones v. Sparrow*.

§ 7. *For insufficient damages.* New trial allowed for the smallness of the damages, where the jury mistake a point of law, but not where damages are uncertain as for words; there seems to be no good reason why the case of too small damages should not be governed on the same principles as excess of damages.

Salk. 647.—2 Mor. E. 263.—Salk. 644.—2 Mor. E. 266.—2 Stra. 1051.

§ 8. New trial for *refusing evidence or for misdirection or non-direction of the judge*. If the judge refuse to admit legal evidence, or if he misdirect the jury, it is cause of a new trial; so where he mistakes the case; 10 Mod. 202. In this case, Parker C. J. said, the judge at "*nisi prius* acts rather in a ministerial than a judicial capacity;" and "when a point of law arises, whether the counsel insist, or do not insist upon it, the judge is bound to direct the jury accordingly; but no new trial, if the counsel waive it; he is in the place of his client;" what evidence ought, or ought not to be rejected; various cases, 2 Mor. E. 272 to 351, stated at large, and the judge at *nisi prius* did not mistake the law. New trial not allowed for mistake of counsel in the cause.

6 Mod. 241.—Salk. 649.—2 Mor. E. 272.—Salk. 646.—3 Mor. E. 112, 113.

No new trial though the verdict be contrary to the judge's direction, if not contrary to law or evidence. 1 Wils. 22.

5 Bac. 242, 249.  
1 W. Bl. 1, *Hanky v. Trotman*.

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3 Wils. 146,  
Bushcall v.  
Hogg.

3 Mor. E. 2.  
—5 Bac. 242,  
243.—1 Vin.  
55.—Styl.  
100.

3 Mor. E. 8.

2 Salk. 646.

Salk. 653,  
Fabrigas v.  
Mostyn.

5 Burr. 2661,  
Rex v. Wood-  
fall.

3 Mor. E. 62.

2 Barnes, 453.  
—3 Mor. E.  
64, 65.—5  
Bac. Abr.  
242, 243.

4 Burr. 2108,  
Goodwin v.  
Gibbon.

2 Stra. 1105,  
Smith v.  
Parkhurst &  
al.—Salk.  
648.

3 Mor. E. 83.

Salk. 642.—3  
Mor. E. 84,  
85.—1 Wils.  
98, Cooke v  
Berry.—6 Mod. 222.—Salk. 653.—2 D. & E. 113.—3 Burr. 1771.

§ 9. If the judge improperly nonsuit the plt. he shall have a new trial, and without costs; was in an action of trover; and so if the plt. submit to it; 1 W. Bl. 670, Pochin v. Pawley; 2 W. Bl. 698; 5 Burr. 2611, Rice v. Shute; bad counts ground to arrest judgment, not a new trial; Lofft, 371.

ART. 5. For various other matters.

§ 1. *Mistrial*. Cause being tried before persons interested, new trial was granted; but if one of the jurors be related to one of the parties, it is no cause for a new trial, for the other party might have challenged him. So if the juror have a suit with one of the parties; but otherwise if the cause or objection was not known.

Debt for rent brought in Middlesex. Plea, *ouster* in Herford, where the land lay; trial in Middlesex a mistrial, and a new trial was granted.

But no new trial for want of notice after defence made.

§ 2. *Locality of trial*. No new trial for want of preparation, and seizing a house in the East Indies is not triable in England; Strange, 646, Shilling v. Farmer; but false imprisonment in Minorca is triable in England; and the law of the place may be shewn to the jury; Cowp. 161; one action *local*, the other *transitory*.

§ 3. *Imperfect verdicts*. Information against Woodfall for printing and publishing a libel in the Public Advertiser, signed Junius; the verdict found the deft. "guilty of printing and publishing only." The verdict was deemed uncertain, and a new trial was granted.

§ 4. New trial for irregularity; delivering written evidence to the jury (produced in the trial) by one of the solicitors; the court was divided as to a new trial.

Where one Richard Geater was summoned as a juror, and one Richard Sheppard was sworn, and sat in his stead; a new trial was granted, though Sheppard's name did not appear in the record; the like as to father and son in several cases.

§ 5. New trials granted after two concurrent verdicts, though not common; this was an action of trespass against an attorney who had exceeded his authority.

§ 6. New trials allowed after trials at bar, and in ejectments. A new ejectment might be brought; 3 Mor. E. 57, 80; where justice cannot be otherwise attained; or in cases of ill practice. 1 Ld. Raym. 514; Salk. 648, seems to be *contra*; and Salk. 650; 1 Bl. 348.

§ 7 So new trials may be granted for the misconduct of witnesses.

§ 8. But no new trial granted for want of evidence that might have been originally produced; nor for want of preparation; and a new trial is never granted for want of evidence

whereof the party is apprised, and which he might have had at the trial; but if a witness fall suddenly sick &c., or is prevented attending by the other party, it is cause for a new trial. So for subornation of a witness after discovered.

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A new trial was granted because the counsel was absent, not thinking the cause would come on, and no defence was made; but denied in similar cases, not the mistakes of counsel &c. that are the causes of new trials; but the real merits not being tried. Lofft, 151; 1 Johns. Ca. 402, 494; 5 Johns. R. 243; 1 Caine, 24; 2 id. 72, 162, 260.

Salk. 645;  
and 3 Mor.  
E. 84.

§ 9. Verdict set aside on affidavit of eight of the jurors, that the foreman had mistaken and delivered the verdict wrong; he declined making affidavit; 3 Mor. E. 99 to 103; two issues as to a way; he gave in a general verdict for the plt.; but the eight jurors testified they meant one for the plt. only; and the mistake was discovered an hour after, and after the judge was gone to his lodgings; was evidence both sides; and it seemed to be the court's opinion that the verdict might be amended, and set right.

1 Burr. 383,  
Cogan, v.  
Ebden & al.

§ 10. The court may direct a *special verdict to be amended*, and direct certain facts proved, to be inserted in it; as the quantity of potatoes bought and sold by a farmer in a bankrupt case. Verdict founded on a declaration containing several counts for the plt. on all amended. So as to be for the plt. on the good counts, and for the deft. on others, which were inconsistent; amended by the judge's notes. 3 Mor. E. 105; but 5 Bac. Abr. 287, contra.

Stra. 514,  
Mayo v. Ar-  
cher.—Dough-  
361, Eddow-  
es v. Hopkins,  
& al. ex'rs.

§ 11. A new trial is never granted if the *prisoner* be acquitted, but otherwise where convicted; 2 Hawk. P. C. 442; and it is settled that the court cannot set aside a verdict which acquits the deft. of a prosecution *properly criminal*; but deft. acquitted on a *penal* act, and a new trial was granted on account of the *judge's misdirection*; 4 D. & E. 753, &c.; but no new trial in a penal action, where the jury have formed an opinion of the whole case, though they have drawn a bad conclusion; same point decided as to the misdirection of the judge; 5 D. & E. 19, Calcraft v. Gibbs; see a. 6, s. 33. This decision perhaps is not inconsistent with the general rule usually laid down, that there can be no new trial granted in a *qui tam* action after a verdict for the deft., or in any *penal* action, though against evidence; this was the jury's finding, and no misdirection of the judge; and 3 Mor. E. 108, 109; but otherwise, obtained by some *trick* in the deft. or *fraud*, or *practice*, or *stealing away witnesses*; Salk. 646; Stra. 899; 3 Mor. E. 161; 1 Wils. 296; 5 Bac. Abr. 252; and after conviction the deft. must be in court in person to move for a new trial; 2 Stra. 844, 963. In *Wilson v.*

4 Bl. Com.  
355.—3 Mor.  
E. 155.—5 D.  
& E. 445.—5  
Lac 252, Wil-  
son v. Rastall.  
—1 Ld.  
Raym. 62.—  
Salk. 644.

2 Stra. 1238,  
Mattison q. l.  
v. Allanson.

CH. 183. Rastall, Lord Kenyon said, the court will in all cases grant a new trial for the misdirection of the judge.

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5 Bac. Abr.  
239.  
2 D. & E.  
484 — 3 Mor.  
E. 338.

§ 12. New trial may be moved for after a motion in arrest of judgment, if the matter be afterwards discovered.

New trial in *quo warranto*, being merely to try a right. So after a special verdict, signed by counsel on both sides; Bunb. 51; 5 Bac. Abr. 239. A verdict is not bad, if found against the party who uses the undue influence; 5 Bac. Abr. 295.

3 Wils. 544,  
Tyssen v.  
Clark —  
Lofft. 496.  
Cowp. 161. —  
Lofft, 263.

No new trial in a writ of right, unless the verdict be flagrantly wrong; 2 W. Bl. 941; this general rule does not apply to our practice and our trial by a common jury.

Where there is a bill of exception, no new trial allowed on the point of law in the bill of exception; 2 W. Bl. 929.

2 W. Bl. 1299,  
Aylett v.  
Jewel.

A subsequent confession of a juror to the deft's. attorney, that the jury drew lots, which six of them should determine the verdict, and not otherwise proved to the court, is no ground for a new trial.

Lofft, 212.

If the assured in a policy be guilty of concealment, and get a verdict, and afterwards this concealment is discovered, there shall be a new trial.

2 W. Bl. 955,  
Broadhead v.  
Marshall. —  
Lofft, 160.

If the deft. *executor*, discover new evidence, being absent from England, before and at the trial, he may have a new trial, though it was in his attorney's hand, but not known to him to be so; and too late on a new discovery, to move &c. if in regular time after.

4 Burr. 2135,  
Rex v. Mal-  
den.  
Lofft, 371.

A new trial was granted because the question had never been fully before the jury.

3 Wils. 272,  
Sampson v.  
Appleyard.

§ 13. Insufficiency of counts is not a ground for a new trial, though it may be in arrest of judgment.

In trespass the deft. prescribed for a way in the *locus in quo*, and in his plea mistook the *terminus a quo*; new trial refused, the merits having been tried.

2 D. & E. 113,  
Vernon v.  
Hankey. — 1  
Bos. & P. 329.

Value and importance alone not a good cause for a new trial, though they will have their weight in cases of doubt on other points, in granting a rule to shew cause why there should not be a new trial.

1 D. & E. 84,  
Gist v. Ma-  
son.

A new trial refused, moved to let the deft. in to prove a policy illegal, not so on the face of it; for he should have shewn it on the trial.

1 D. & E. 20,  
Sutton v.  
Mitchell.

A new trial was granted on new ground not opened at the first trial, but it was ordered to be upon the payment of costs.

7 D. & E. 529,  
Pleydell v.  
Ld. Dorches-  
ter. — 2 Burr.  
936.

Case for *diverting plis. water course*, and the jury under circumstances of aggravation, gave £3000 damages; new trial was granted on the ground they greatly exceeded the amount of the injury proved; but the court directed the for-

mer verdict to stand as security for the damages to be given on the second trial. CH. 183.  
Art. 6.

§ 14. The court will let the verdict stand wherever according to the equity and conscience of the case, though against evidence and forms of law; there are many cases to this purpose, some before stated; also 4 D. & E. 468, *Wilkinson v. Payne*; 1 Bos. & P. 338, *Cox v. Kitchen*; 2 D. & E. 4, *Edmonson v. Machell*; in such case the court will not discuss the question of law &c.; 1 Bos. & P. 158, *Keate v. Temple*.

If the testimony of witnesses on which the verdict is found, derive its credit from particular circumstances, and there be afterwards clearly falsified by affidavit, the court will grant a new trial. 1 Bos. & P.  
427, *Lister v. Mundell*.

§ 15. *Where the jury misbehaves, as draw lots, &c.*, a new trial will usually be granted; 3 *Caine*, 61, 96, *Woods v. Hart*; *Willes*, 488; 2 Lev. 130, 205, *Fry v. Hardy*; but what evidence of such misbehaviour shall be admitted, has long been a question, especially if the affidavits of the jurors held admissible; 3 *Caine*, 57, *Smith v. Cheetham*; 1 Mass. R. 530, *Grinnell v. Phillips*; see 4 Dall. 112; 1 Hen. & M. 385; 2 id. 245; 1 Wash. 79; refused 1 D. & E. 11, *Vaisec v. Delaval*; 4 Bos. & P. 326; 14 Mass. R. 248, testimony from jurors not admitted as to the manner and motives of their agreeing to a verdict. Stra. 642,  
*Hale v. Cove*  
—Com. R.  
625.

#### ART. 6. *American cases.*

§ 1. The court will not hear an argument on a motion for a new trial, unless the motion and reasons are filed in the case. 1 Mass. R.  
202, *Brown*,  
exr. v. *Swau*.

§ 2. The court will not grant a new trial where substantial justice had been done by the verdict; nor where the party moving for it has a right to review, unless he will relinquish that right; *assumpsit* was brought, and the objection was, that trespass for the mesne profits was the proper action. 1 Mass. R.  
227, *Cogswell*  
v. *Brown*.—2  
Mass. R. 116j

§ 3. The plt. moved for a new trial, and also in arrest of judgment; for a new trial: 1. Excess of damages: 2. New evidence discovered since the trial: 3. The jury found against the court's opinion. *Curia*, the case sounds in damages of which the jury are the judges; new evidence is no reason for a new trial; not against the court's opinion, if the facts be true, of which the jury must judge. According to 1 Burr. 334, these motions could not be made together; but see *Riddle's case*. Mass S Jud.  
Court, Essex,  
June, 1784,  
*Stickney v.*  
*Atwood*.

§ 4. A motion was made to set aside a verdict in trespass, for gross misbehaviour in the jury; and the court admitted one of the jury as a competent witness to prove the fact, that ten of the jury named each a sum for the plt's. damage, added 1 Mass. R.  
641, in *Grinnell*  
v. *Phillips*; see Ch.  
182, a. 7, s. 6,  
contra, 16.

Ch. 183. them together, and divided the amount by 12; "and the sum thus found became the amount of damages, in which all the jury finally agreed;" verdict delivered and recorded &c.; new trial not granted, though the court will set aside a verdict for gross misbehaviour in the jury, such was not proved in this case.

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2 Mass. R.  
36, Jones v.  
Alexander.

§ 5. In this case, the court refused a new trial, because the former trial was before the whole court; the whole court had admitted the piece of evidence objected to.

3 Mass. R.  
124, Middle-  
sex Canal  
Corporation  
v. McGregor.

§ 6. The court will grant a new trial if the judge reject evidence offered by the deft. proper to be received under one count, though such count was not relied on, nor read by the plt. at the trial, a general verdict being given for the plt. on all the counts; for evidence that applies to any one count, is legal and relevant evidence.

4 Mass. R.  
79, Dinham  
& al. v. Bax-  
ter.

§ 7. If on the trial, the judge thinking the plt's. evidence not sufficient to support his action, stops the deft. from producing his evidence, and the jury find for the plt., a new trial must be granted, the deft. waiving his right of review.

As to bringing forty-one cents too little into court, and the judge directing &c., see Boyden jun. v. Moore, administrator; Ch. 170, a. 15; see also Keyes, in error, v. Stone, Ch. 9, a. 22; also Hammond v. Wadham, Ch. 100, a. 2.

5 Mass. R.  
463, Whitney  
v. Whitman,  
jr. 15 Mass.  
R. 378.

§ 9. Where upon a trial, a material paper not read in evidence, had been given the jury by mistake, a new trial was granted, and without costs. The court refused to examine any of the jury. So where one party used a witness he knew was interested, and this not known to the other.

6 Mass. R.  
459, Page v.  
Pattee.

§ 10. If in a trial, the judge thinks the evidence clear for one party, omits to sum it up to the jury, and they find their verdict for the other party, a new trial is granted of course.

6 Mass. R.  
504, Root v.  
Henry.

§ 11. The deft. moved in arrest of judgment, and stated five reasons, or prayed that the said matters might be reserved for the consideration of the court, as by the law in such case provided. Held, this was not a case within the statute, but a motion in arrest of judgment, which one judge might decide, "as the objection is on record, and the party aggrieved may be relieved on error."

7 Mass. R. 65,  
Cunningham  
v. Kimball.

§ 12. This was an action of trespass on the case, and the evidence at the trial differed from the declaration in a part not constituting the gist of the action; and on motion for a new trial on this ground, the court refused it. Part of the contract alleged was the plt's. keeping a pair of steers a week. This part was not proved; the court thought it immaterial, as the action was founded mainly on the deft's. false affirmation that his mare was sound; here was both a motion for a new trial, also in arrest of judgment; same, 7 Mass. R. 169.

Middle's case.

§ 13. Held, a want of recollection of a fact, which by due attention might have been remembered, is not a ground for granting a new trial. No new trial if evidence on both sides; 1 Caine's R. 24, contra 162. 7 Mass. R. 205, Bond v. Cutter. CH. 183. Art. 6.

§ 14. In a trial in the common pleas, certain evidence was rejected, and a bill of exceptions filed, and error brought in the Supreme Judicial Court; and this evidence here was deemed admissible; a new trial was ordered at the bar of this court. 6 Mass. R. 391, Keyes v. Stone.

§ 15. But in this case, where the reversal was in favor of the deft. on a bill of exceptions, held, a new trial must be awarded by the court below. Ch. 186, a. 9, s. 13, 14; Ch. 194, a. 2, s. 28; see Cabot v. Bingham. 6 Cranch, 281, Hudson v. Guestier.

§ 16. A motion for a new trial is not to be made after a motion in arrest of judgment; as so moving, impliedly admits the verdict is good. 2 Dallas, 121.

Where each of the jury put down a sum for the plt's. damages, and added them together, and divided the whole sum by 12, and took the quotient for the damages found; no cause of a new trial. 2 Dallas, 55. —1 Caine, 162, 236, 520.

§ 17. Granting new trials depends on the legal discretion of the court, guided by the nature and circumstances of each particular case; not in a hard case, though the verdict be against evidence. 3 Johns. R. 180. 1 Dallas, 234. —Bay. 63. —Taylor 277. —Salk. 646.

§ 18. Though a verdict be against the weight of evidence, yet the action sounding in tort, being against the sheriff for an escape, and the sum in dispute small, and the evidence as to the damages contradictory, new trial refused. The value of the prisoner's property was uncertain. 8 Johns. 296, Tracy v. Whipple.

§ 19. Debt for a penalty in a special contract; plt. nonsuited; court refused a new trial, though it thought the plt. entitled to a verdict, as no damages were shewn, nor any rule by which to ascertain them; and as a new trial could only afford the plt. an opportunity to recover nominal damages. To refuse a new trial is no ground for a writ of error. 4 Wheat, R. 220. 1 Johns. Cas. 255, Brantingham v. Fay. —1 Johns. R. 509.

§ 20. *After discovered evidence*—new trial refused on account of, as the newly discovered evidence did not relate to new facts, but only went to corroborate the testimony at the former trial, or to add cumulative facts merely, or circumstances relating merely to matters controverted at the former trial. A plea of usury must be strictly proved. 8 Johns. R. 84, Smith v. Brush & al. —Cowp. 671.

§ 21. *Ejectment*. Motion for a new trial, for new and material evidence after discovered. The affidavit stated that C. who claimed title to the land in the possession of B., his tenant, had the care of the defence, and was present at the trial. 8 Johns. R. 489, Jackson v. Laird.

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Art. 6.

F. was a witness at it; but C. did not know till after it, that F. could testify to the facts stated as material, though B. not present, did know before the trial, what F. could testify. New trial granted, as the evidence was material, and the suit being to change the possession of several years. B. had abandoned the defence to C. &c.

7 Johns. R.  
306, 308,  
Mercer v.  
Sayre & al.

§ 22. After the deft. had closed his argument, and while the plt. was closing his, the deft. discovered new and material evidence, this he offered, but the judge refused it, thinking he had no discretion, but by plt's. consent to admit it. Verdict for the plt. New trial granted; and held, the judge had a discretion to admit it, and it ought to have been admitted.

4 Johns. R.  
425, 3 id.  
255, Shum-  
way v. Fow-  
ler—5 Johns.  
R. 248.

§ 23. A new trial is not to be granted, to let in newly discovered evidence, merely to impeach the character of a witness at the trial. Nor on newly discovered evidence, where the affidavit states only, that a person had told the party what he would say. 5 John. R. 248; 2 Cain. Eq. 162; 2 Cain. 129, 133; 1 Bay. 263, 491.

1 Johns. Cas.  
402, Doe v.  
Roe.

§ 24. On an affidavit of new discovered evidence, a new trial was granted on an issue out of chancery. 3 Cain. 186, 307.

§ 25. The judge charged the jury, that in his opinion, the weight of evidence was with the deft., and the jury found for him. New trial for this misdirection refused; the court being satisfied the plt. ought not to recover. 1 Johns. Cas. 250, Goodrich v. Walker.

1 Johns. Cas.  
336, Silva v.  
Low.

§ 26. If a jury on a second trial, find a verdict against the decision of the court, on a point of law, on which the new trial was granted, a third trial will be granted.

2 Johns. Cas.  
318, Alexan-  
der v. Byron.

§ 27. One of the deft's. witnesses regularly *subpœnaed*, did not appear till the evidence was closed, and the deft. was closing on it. This witness was then offered, but refused by the judge, and a verdict for the plt. New trial refused; for in that stage of the cause, the judge had a discretion to admit him or not, and exercised it properly.

3 Johns. R.  
252, Hackley  
v. Hastie &  
al.—1 Cain.  
R. 620.

§ 28. If the jury improperly take a paper out with them, but never look at it, nor are influenced by it, no new trial will be granted on that account. New trial where the verdict is clearly against the evidence.

3 Johns. R.  
271, Ward v.  
Center.

§ 29. Evidence on both sides and no misdirection of the judge as to the law, on a question of fraud. No new trial. Fraud being a question of fact. for the consideration of the jury. 1 Dall. 234; 2 Bin. 108, 495, 510; 3 Wils. 39; 1 Cain. 162.

3 Johns. R.  
105, 114, Smith v. Elder.

§ 30. On a motion for a new trial, the deft. cannot object

to the form of the action. As of *tort* for violating foreign revenue laws. CH. 183.  
Art. 6.

§ 31. Unless some rule of law be infringed, a new trial is not to be granted in a penal action, merely because the verdict is against the weight of evidence. Nor in cases of slander &c. 3 Johns. R. 180, *Jarvis v. Hathaway*.

§ 32. The cause of action was trifling, and the plt. recovered nominal damages; no new trial for the judge's misdirection, if the plt. will discontinue without costs. See also 10 Johns. R. 447, 452, *Dole v. Lyon*. 3 Johns. R. 528, *Fleming v. Gilbert*.—1 East, 683.

§ 33. Assault and battery, and the injury trifling, and verdict for the deft., no new trial, notwithstanding the misdirection of the judge. As to misdirection, English cases *contra*, see a. 5, s. 11. 3 Johns. R. 239, *Hyatt v. Wood*.

§ 34. Case by the husband against his wife's father for enticing her away. Verdict for the plt., and \$1,200 damages. New trial was granted, because the judge in his charge, and the jury in their finding, had not well considered the distinction between this case of a *father* and of a *stranger* enticing away &c.; also because of the special circumstances of the case, and the amount of damages. The law presumes the father acted from parental motives. 5 Johns. R. 196, 210, *Hutchinson v. Peck*.—1 Bin. 129.

§ 35. By the seventeenth section of this act, the Supreme Court of the United States, the Circuit and District Courts, have "power to grant new trials in cases where there has been a trial by jury, for reasons for which new trials have been usually granted in courts of law." Judicial act of Congress. Sept. 24, 1789.

§ 36. If the judge instruct the plt's. evidence is wholly insufficient, from which they may presume facts sufficient to justify a verdict for him, a new trial will be granted; for as it is matter for their consideration in such case, they ought to have an opportunity to weigh it. Judgment of the common pleas reversed, and a *venire facias de novo* awarded. 12 Mass. R. 22.

§ 37. In Pennsylvania the proper time to move for a new trial seems to be within the four days after the day on which the cause was tried, if tried in term time; but if in the vacation, within the first four days of the next term, as judgment may be entered up after such four days are past; and so in New York, generally. The same rules nearly in the English practice. Dougl. 171, *Birt v. Barlow*; Id. 797, *Rex v. Gough*; 2 Bos. & P. 393. The day of the trial is computed one of the four; but the rule does not extend to causes, where the term closes before the four days are expired. The rule holds as well in criminal as in civil causes; but is not absolute, as any time before judgment if injustice be done by the verdict, a new trial will be granted. 1 Johns. Ca. 402.—1 Cain. 487.—2 Dall. 229.—1 Bin. 242, 450.—5 D. & E. 436, *Rex v. Holt*.

CH. 183.

Art. 7.

13 Mass. R.  
218, Knight  
v. Freeport;  
and 221.

2 Caines' R.  
85.

Id. 155.

3 Dallas, 515,  
U. States v.  
Fries.

10 East, 268,  
Brook q. l. v.  
Middleton.

6 D. & E.  
638, Rex v.  
Mawbey &  
al.—1 Johns.  
Ca. 181.—2  
Cain. Er. 319.  
—3 Dall. 515.  
—1 Bay, 372.  
—5 Bac. 252.  
—2 D. & E.  
484, Rex v.  
Francis.

Salk. 646,  
Rex v. Bear.

12 Mod. 9,  
Rex v. Davis.

§ 38. *For misconduct of the plt's. son-in-law* granted, who said to a juror, the cause was of great consequence to him; if decided for the deft. he must pay costs, and that it was a spiteful action on the deft's. part. Granted, because two of the traverse jurors had been on the grand jury, that found the bill. Hussey's case.

§ 39. No new trial will be granted for the misdirection of the judge, if not to the merits of the cause, or if it do not influence the jury.

§ 40. The application for a new trial for newly discovered evidence, must shew it actually discovered since the trial. See art. 5, s. 11.

ART. 7. *Criminal cases.* See several cases in the preceding part of this chapter.

§ 1. New trial granted in the case of treason, on account of the previous declaration of one of the jury.

§ 2. The deft. was acquitted on an indictment, for not repairing the highways. New trial refused. 1 Wils. 298. And no new trial in penal actions, as a general rule, where the verdict is for the deft. 1 Wils. 17; 3 Wils. 59. But will be if the verdict be against him. 1 Wils. 329; 2 Stra. 968, 1102; 4 Burr. 2257; Lofft, 451.

§ 3. New trial refused in a penal action, on a verdict for the deft., though on the ground of its being against evidence. So 6 East, 315, Rex v. Reynel. Indictment for not repairing a church-yard. 1 Wils. 17; 3 Wils. 59.

§ 4. In this case several were indicted for misdemeanour, and some of them were acquitted, and some were convicted. Held, the court may grant a new trial as to those convicted, if they think the conviction improper; and Lord Kenyon said, "that in granting new trials the court know no limitation, (except in some excepted cases) but they will either grant or refuse a new trial, as it will tend to the advancement of justice." "In one class of offences indeed, those greater than misdemeanours, no new trial can be granted at all." New trial in a criminal case granted, if the deft. get a verdict by a trick. A new trial may be granted in an information in the nature of a *quo warranto*. The verdict had been found for the deft. against the weight of evidence; and the court said, that of late years a *quo warranto* information had been considered merely in the nature of a civil proceeding. The suit was to shew by what authority the deft. claimed the office of alderman of Cambridge.

§ 5. New trial never granted in a criminal case, where the deft. is acquitted, unless he is guilty of some unfair practice. 5 Bac. Abr. 252.

§ 6. Deft. acquitted of a riot, new trial refused, though in

the opinion of the judge, that the verdict was against evidence, because not obtained by the deft. by any unfair practice or fraud. 5 Bac. Abr. 252, 253. CH. 183.  
Art. 8.

But granted in a criminal case after acquittal, because the deft. brought on the trial without giving notice of it to the prosecutor. 5 Bac. Abr. 253, Rex v. Coke. 12 Mod. 9.

Settled, if the deft. be found guilty on an indictment &c. may be a new trial. Defts. convicted of a conspiracy, must be all present on motion for. 3 Maule & S. 9, 11. 6 Bac. 253.

ART. 8. *Difference between new trials and venire facias de novo.*

§ 1. *Venire facias de novo*, was the ancient common law process. New trials have been much allowed in modern times. The most material difference is this; a *venire facias de novo* must be granted on matter appearing on the face of the record, but a new trial may be granted on things out of the record, and if the record appear entirely right. If the verdict appear to be given contrary to the evidence given at the trial; or if it appear the judge has given wrong directions, a new trial will be granted. But a *venire facias* can issue only when the verdict is so imperfect that no judgment can be given upon it: or 2. Where it appears the jury ought to have found other facts differently. As if a jury, in a special verdict in trover, find a demand and refusal, a *venire facias de novo* shall go; for this finding is only evidence of a conversion, and they ought to have found a *conversion*. *Venire de novo*. 2 Hen. & M. 318, 344. 1 Wils. 55, Witham v. Lewis.—6 Com. D 395. —By the court above, Dougl. 696, 722.—2 D. & E. 53, 125.—2 Saund. 38—Cro Car. 284, 311, 312.—3 Mor. E. 259 to 296.—Reg. Jud. 6, 7, 8, various old forms.—1 Hen. & M. 387, Pigram v. Isabell.

§ 2. In this case a new trial was granted for the deft. in a criminal case, upon the report of the judge and affidavit of all the jurors, stating that the verdict was taken contrary to their meaning, and the judge's direction in point of law. It seems a general verdict of guilty was understood and recorded, when in fact the foreman of the jury "declared, that they did find him guilty of putting the three ducats into the pocket of Ashley, *without any intent*," and the words, *without any intent*, were not heard by reason of a great noise in court. So this was not granting a new trial on any afterthought of the jury: was a verdict merely misentered. 1 Wils. 239, The King v. Simmons.

§ 3. After conviction, the deft. must be in court to move for a new trial. No new trial in a *qui tam* action after verdict for the deft.; nor after four years' acquiescence. 2 Stra. 968, 899, 995.

§ 4. New trial refused after verdict for the deft. on a plea of not guilty to an indictment for a nuisance. 4 Maule & Sel 337.

No new trial in a penal case after a verdict for the deft. See Ch. 148, a. 12, s. 17. 10 Johns. R. 101.

§ 5. In Connecticut, a motion in writing for the term the Sholes v. Stoddart.—Id. 206, Door v. Chapman.—Id. 282, Noyes v. Huntington. Kirby, 163,

CH. 183. trial is had, is sufficient notice to hold the other party to appear and answer. If certain reasons be assigned for continuing an action, and all are rejected, they cannot be assigned on a motion for a new trial. Not allowed on account of new discovered evidence of a witness, which by using due diligence might have been known and had at the trial; and when witnesses named in the petition for a new trial, are not allowed to be sworn, other witnesses will not be allowed not named; but *secus*, if the witnesses so named be sworn.

Art. 9.

4 Day's  
Ca. 42, Alsop  
v. Magill.—  
Id. 408.

Where justice has been done, no new trial will be granted for the judge's misdirection to the jury; nor if the judge make observations to the jury on the question of accepting their verdict connected with evidence used on the trial. Russel v. Bradley & al.

Mass. act,  
Jan. 29, 1818.

§ 6. By this act the Supreme Judicial Court has power to order this writ of *venire facias*, for the grand or traverse jury to attend the same court, to be returned, as will serve the purposes of of justice.

ART. 9. *Other American cases.*

2 Caines' R.  
224.—3  
Caines' R.  
357.

§ 1. A motion for a new trial, because the facts proved did not support the verdict; decided the court will not receive testimony to supply the deficiency of the evidence at the trial to prevent a new trial, unless the testimony offered be incontrovertible in its nature; such as a record &c.

2 Caines' Ca.  
85.

§ 2. No new trial on the affidavit of a witness he was surprised or mistaken at the trial; nor because a juror was challenged when the deft's. counsel was occasionally absent; nor, third, because of the discovery of new witnesses to the same fact sworn to in the original trial.

2 Caines' R.  
253, Wil-  
liams v.  
Smith.

§ 3. *Costs in cases of new trials.* On granting one, costs are of course, if not otherwise expressly directed; or the new trial is granted for the judge's misdirection. So if denied, costs of course for resisting. 1 Johns. Ca. 270.

3 Caines' R.  
87, Smith v.  
Cheetham.

§ 4. No objection to a new trial if judgment be entered before argument, for want of an order to stay proceedings, refused to be granted by the judge, because he thinks the cause will be decided within the first four days of the term.

2 Caines' R.  
260.

§ 5. The newly discovered evidence examined on a motion for a new trial. As where on account of it coming from A. B., stated to be a person of good character and reputation, a new trial was moved for, affidavits were admitted to show that he was not worthy of credit.

3 Johns. Ca.  
125, Duncan  
v. Dubois.

§ 6. Not granted on a mere technical objection, as if a printed statute book be admitted in evidence, when it appears correct by examining the private act.

1 Johns. Ca.  
179.

§ 7. The court of sessions, being a court of inferior jurisdiction, has no power to grant a new trial after a verdict on the merits.

§ 8. On motion for a new trial, the court in the exercise of a sound discretion, will take into consideration the injustice of the claim, as to which the jury may have made a mistake. Per Kent C. J. 7 Johns. R. 238, 247, *Johnson v. Ogden*. CH. 183. Art. 9.

§ 9. The jury find a verdict for the deft. on a libel, the court will not grant a new trial merely because the jury misunderstood or disregarded the evidence, unless perhaps in a case in which the defamation was so gross, that finding for the deft. would be pretty good evidence of prejudice, partiality, or corruption. 3 Wils. 59; 10 East, 263; 2 Burr. 664; Cowp. 37. 9 Johns. R. 36, 37, *Hurtin v. Hopkins*. — 3 Johns. 180.

§ 10. *Excessive damages in cases of tort*; as defamation, libel, &c.; generally the court will not grant a new trial, except where the damages are so extravagant as clearly to show passion, prejudice, partiality, or corruption in the jury; and the court made a distinction between cases in which the damages are mere matter of opinion, and in which they may be clearly seen. 9 Johns. R. 45, 55, *Coleman v. Southwick*.

§ 11. Plt. nonsuited; new trial refused, on the ground the plt. was surprised by the defence. *Jackson v. Roe*; 1 Wils. 93; 2 Binney, 583. 9 Johns. R. 77, 78.

§ 12. *Newly discovered evidence*. The court will grant a new trial on that which goes merely to support the plea of not guilty; but not that which only supports the plea of justification in an action of defamation. 9 Johns. R. 264, *Beers v. Root*.

§ 13. Verdict set aside, and new trial granted; a copy of the rule must be served on the plt.'s attorney before the deft. can move for a nonsuit for not going to trial. 9 Johns. R. 265, *Jackson v. Wilson*.

§ 14. Action for a libel, charging insanity; parol evidence admitted to prove the averment in the declaration, that the plt. was state printer, and president of the Mechanics' and Farmers' Bank, these facts being stated as matter of inducement. Held, that in actions for libels and other torts, the court will not set a verdict aside on the ground of excessive damages, unless flagrantly outrageous and extravagant. 10 Johns. R. 443, *Southwick v. Stevens*. — 2 Phil. Evid. 99.

§ 15. On the affidavit of two of the jurors, a motion was made for a new trial, on the ground they had been influenced in giving their verdict by the information of another of the jurors; but the motion was denied: this matter was decided on the general principles of the common law. See *Cochran v. Street*, 1 Wash. 79; see a. 4. 1 Hen. & M. 383, 387, *Price's exr. v. Warren, admr.*

§ 16. *As to new trials in the chancery cases*. The chancellor directed an issue to be tried at common law; and there being two concurring verdicts on it for the same party, though both against the opinions of the judges, and though there had originally been a verdict for the other party, held, the chancellor was not bound to direct a new trial. See *Ross v. Pines*, 3 Call, 568. M'Rae's exrs. v. Wood's exrs. 1 Hen. & M. 548.

CH. 183.

Art. 9.

  
 Merc. J. 11, 12.  
 Johns & al.  
 1 Hen. & M.  
 584, 601.

§ 20. On an appeal from a decree of the Superior Court of Chancery for the R. D., held, that after the plt. has obtained a verdict in an action *sounding in damages*, and the law court has refused a new trial, a court of equity ought cautiously to interpose. This cause was brought into the court of chancery by an injunction to the judgment of a court of law. Where a defence is purely *legal*, it must be made in a trial at law. *Maupin v. Whiting*, 1 Call, 224. And after a cause has been once fully decided at common law, equity ought not to interpose. *Terril v. Duke*, 1 Call, 546.

*Preston v.*  
*Harvey*, 2  
 Hen. & M. 55,  
 68, *Smith v.*  
*Harmanson*.

§ 21. If *illegal* evidence be admitted to the injury of a party, it is no cause of a new trial, if afterwards in the same trial other and *legal* evidence clearly proves all the illegal evidence does, so that it does not vary the case. A party has no new trial, error, or appeal, where the error is to his benefit. 1 Wash. 6.

§ 22. *New trials in chancery cases restrained.* When an issue out of chancery is tried in a law court, and that is satisfied with the verdict, and by it a motion for a new trial is overruled, and there is no exception thereto, the verdict is never to be disturbed. In trying such issue, witnesses are properly examined *viva voce*; hence not to be inferred, only the answer and depositions were used; but rather there ought to be evidence they were used; as chancery ought to give directions as to reading papers filed in the cause. *Paul & al. v. Paul*, 2 Hen. & M. 525, 536; 1 Rev. Code, c. 92; see Ch. 223, a. 11, s. 37.

§ 23. A *new trial refused in equity*, because the evidence discovered after the trial had, and on account of which equity was urged to direct a new trial, might have been obtained in season, if there had been ordinary diligence used. *De Lima v. Glassell's administrator*, 4 Hen. & M. 369; *Morris v. Ross*, 2 Hen. & M. 408.

§ 24. *Remark.* The reader will observe, that in the numerous cases above stated, as to new trials, various rules are found in the books, English and American; but all subject to exceptions but one, that is, every amendment depends, on the whole, on the sound discretion of the court, which no doubt will be influenced by practice and precedent.

## CHAPTER CLXXXIV.

## PLEADINGS—AMENDMENTS.

Pleadings, amendments, and matters aided by verdict. (As to sundry amendments, see Error, Ch. 137, and in other Chapters, see Index.)

ART. 1. *General principles.*

§ 1. Though the statutes respecting amendments, and which aid or cure defects in pleading, are numerous, they extend not in England, or in the laws of the United States, to *criminal* cases. But the acts allowing amendments in the laws of Massachusetts are general. Though by force of these acts a verdict may cure a title *defectively stated*, it cannot cure or aid a *defective title*; and generally these statutes cure defect in *form*, not pointed out as special causes of demurrer, but not defects in *substance*.

§ 2. Some *amendments* are made, and some defects cured, as well in *criminal* as *civil* causes, on the principles of the *common law*; therefore it was resolved in this case, that whatever at common law might be amended in *civil* causes, was amendable in *criminal* causes; and the court said, "so is the law at this day;" and it has been held, that the 14 Ed. III. and 8 H. VI., are the only statutes of *amendments*; and that the others are statutes of *jeofails*. *Quære*, if not more than these two.

Salk. 51.

Queen v.

Tutchin.

6 Mod. 283.

§ 3. It is no easy matter fully to understand the true principles of amendments and jeofails in the United States, because these are found not only in the common law of England, in part on this subject adopted here, and in many English statutes, but also in several American statutes, Federal and State; containing different principles and different expressions, and considerably differing in form and substance from those of England, as will be seen on a comparison of them. These principles are naturally a part of a well digested system of pleadings, in which written forms are adopted. In practice, in such a system, the court and parties have the means and opportunities of discovering errors committed, even by the best pleaders, in numerous instances, especially in variations from established written forms. To allow every error or fault in form to be fatal, was early found to be intolerable, and almost a denial of justice. The rules of the common law were found to afford but a partial remedy; and therefore the wisdom and experience of our ancestors very

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early discovered that statutes were necessary to aid that law in this respect. And it has been well said, that when pleadings were *ore tenus*, "no science or nicety of expression" was required, "and there was no fear of demurrers, or pleas in abatement;" and hence if a party could tell his own story, "and make it understood by the bishop and earldorman," it seems to have been sufficient.

On the Conquest, to these pleadings, *ore tenus*, carried on according to the dictates of common sense, all the niceties and subtleties of the Norman lawyers were substituted. In this new system, which continued several centuries, of nicety and chicane, every step and every defect objected to, and not rectified, was fatal; and as the pleadings in England were long in a *foreign* language, the subtlety was the more intolerable. In this wretched state of things, it was in vain to fine lawyers for bad pleading; there was no remedy but in a change of system. But in the course of ages, these Norman refinements, intricacies, quibbles, and subtleties, got so worked into the law of England, that they could not be wholly expunged in any practicable manner, the only remedy was in gradual amendment. In this work of improvement, not much was done till the reign of Edward the First, the English Justinian; and from his time to the present, this improvement has been going on, and has been the joint work of legislatures and courts of law. Fines for bad pleading had some good effects; by them, as well as by other considerations, lawyers in parliament, as well as in the courts of law, were made more attentive to pleadings, and to find remedies for the numerous faults and defects that could not be avoided in practising on the Norman system, transmitted as it was, to later ages. In this progress of amendment, there was introduced one excellent feature in pleadings five centuries ago,—*pleas were short and pithy*; and it is to be lamented that pleas, in England especially, have lost too much of this character, whilst much improved in other respects.

§ 4. In this progress, the principal things to be considered are the principles of the *common-law* on this subject, the twelve English statutes of amendments and jeofails, several American statutes to the same purpose, and the constructions that have been given of these in both countries. (Justices at sessions may alter and amend their judgment during the sessions. 1 Maul. & Sel. 442.)

ART. 2. *Principles of the common law.*

§ 1. By this law the judges could amend their judgment and other parts of the record, in the *same* term in which it was pronounced; as during that term the whole record was deemed to be in the judges' breasts, and not in the roll; but

3 Bl. Com.  
406.—3 Salk.  
32.

by this law the least mistakes of the clerks in making out the process or entry &c. in any part of the record, even a mistake in writing a syllable or letter too much or too little, made void the whole proceedings. 8 Co. 157 a, old editions, 310, Dublin edition of 1793, Blackmore's great case.

CH. 184.  
Art. 2.

§ 2. "At common law *very few* amendments are authorized, and those when there was something in some part of the record by which to amend." 3 Mass. R. 210.

§ 3. It seems always to have been a settled principle at common law to allow trivial errors, as the mispleadings and other mistakes of the clerks, to be amended while all the proceedings were in *feri*, but not after; but in ancient times they were considered in *feri* and in the breast of the judges, only "within the very term in which the judicial act was" done and recorded. But this ancient strictness is done away; and in modern times a more liberal practice prevails, and wherever justice requires it, amendments are allowed any time pending the suit or proceedings; and these are now considered in *feri* and pending, until judgment is given, though the record be made up, and the term be past; but now when judgment is once given and enrolled, no amendment is permitted in a subsequent term, on the principles of the common law. The consequence was, if the most trivial errors or defects in mere form were not so amended in time, they became the grounds of writs of error, to the constant vexation of the parties concerned, and the delay of justice. After a long time thus, the time for making common law amendments, was correctly settled to be while all was in *feri*, and until judgment was rendered and enrolled; but the other question still remains, and forever must, in the nature of the case, that is, what are among the small or "very few amendments" that are authorized at common law. Liberal judges will allow some that scrupulous judges will not. What is a small amendment, or a mere matter of form, will usually much depend on the special circumstances of the case and the amendment proposed. In ascertaining what amendments can or cannot be allowed, nothing more can be done here than to select some of the best rules and cases from the thousands in the books, in addition to those already stated in the prior chapters.

3 Bl. Com.  
406.—Co. L.  
260.—Ch. 95.

§ 4. At common law, an amendment was allowed in an information, of a small misprision; as in the title of the record, in the case of a riot, after a motion in arrest of judgment. 3 Mod. 167, *Rex v. Hockenul*.

1 Com. D.  
Amend. A.

§ 5. So in an indictment for a nuisance, where the *similiter* was omitted in the issue. Same omission amended in a *qui tam* action; that is, the clerk of assize did not join the issue,—

2 Rol. 59—  
Cowp. 407

CH. 184. 2 Cro. 502, Harris' case,—so the verdict was without issue, and though this clerk was removed several years before, he was ordered to join the issue by way of amendment. So issue joined by way of amendment after verdict. 2 Cro. 67, Berton v. Mandel.

1 Com. D. Amend. A. § 6. So an indictment against two, worded in part in the singular number, amended.

Stra. 843, Rex v. Hayes. --Ld. Raym. 1518. § 7. Indictment for forgery of a bond, and variance in the addition of the obligor, and special verdict found. The court thought this amendable at common law, there being something in another part of the record to amend by.

1 Com. D. 431. § 8. So the misprision of the court itself amended, as a non-entry of a continuance: so where the *jurata* was entered between the tenant and vouchee amended to be between demandant and vouchee.

Cro Car. 144, Rex v. Tufston & al. § 9. Information *quo warranto*. Verdict and judgment entered on a disclaimer. In making up the judgment the clerk omitted the date of a material patent. In a subsequent year after this was done, the court ordered this amended, by interlining the date in the record of the judgment, on proof it was his omission, this date having been written in the margin of the paper book, and by accident, or otherwise, was crossed out.

2 Burr. 1098, Bonfield q. t. v. Milner.—And many cases cited, 1 Wils. 256. § 10. *Qui tam* action for usury on a note, and the date of it was mistaken in the plt's. declaration. Allowed to be amended, all being in paper. And the court said, the rule was, "that whilst all is in paper, you may amend." "This is an amendment at common law." "To be sure, the statutes of amendment do not extend to penal actions." Dennison J. "there is no difference between civil and penal actions, where they apply, as for an amendment at common law, and all is in paper."

2 D. & E. 707, 1808, Goff q. t. v. Popplewell. § 11. This principle in this case, was recognized by the whole court; but as this action had been pending four years, they would not in their discretion permit the declaration to be amended. The amendment moved for was in the dates and sums. The plt. was barred in another action by the statute of limitations. Plt. not allowed to amend after a delay of several terms. 2 Johns. R. 206, 207, several cases cited.

6 D. & E. 171, 174, Steel q. t. v. Sowerby. § 12. This was a penal action for usury, and plt. barred in another action by said statute. Court refused leave to amend the declaration, as to the sums stated to have been received by the deft. Lord Kenyon recognized Justice Dennison's principle above. Cited Rex v. Wilkes, 4 Burr. 2527. Denied, because a penal suit that had been long pending.

Wilkes' case.

§ 13. So in this action the court resolved it would not allow any amendment in a penal action, where the plt. was guilty of any delay in carrying it on. Declaration in a *qui tam* action amended. 1 Wils. 256; 8 D. & E. 30, Ranking v. Marsh, *qui tam*. CH. 184.  
Art. 2.

§ 14. But in this action *qui tam*, the plt. was allowed to amend his declaration, after the limitation for bringing another action, as he had been guilty of no unnecessary delay: was an action against the deft. for acting as an attorney without a certificate. 6 D & E. 543,  
Cross v. Kaye.

§ 15. But the amendment proposed must not introduce any "new substantive cause of action." This is an invariable rule. 7 D. & E. 65,  
Maddock v.  
Hammelt.

§ 16. This was an indictment for treason. In making up the judgment, the words usually inserted, to wit, "*quod interiora extra ventrem suum capiantur*," were inserted, omitting "*ipsoque vivente comburentur*." Error was brought to reverse the attainder; and a motion was made to amend the judgment in this respect; but denied. The court seemed to think the omission was of substance. Many cases cited both sides. Replication amended, pleadings being in paper. 1 Wils. 76. 4 Mod. 395  
to 402, Rex  
& Regina v.  
Walcott.

§ 17. A writ of inquiry was executed and costs taxed, and lost before final judgment. Leave was given for a new writ of inquiry and inquisition, according to the sheriff's notes, and costs indorsed thereon, as they appear to have been taxed according to the commitment book. Stra. 1077.

§ 18. The entry was, that a minor appeared by attorney, amended to appearance by guardian. But not amended if no undertaking to appear. Stra. 114.

§ 19. Such mistakes as are made by the clerk in court, may be amended; but those in the pleadings being made by the party himself, cannot be amended; and it is material there is something to amend by. Judgment *de bonis propriis* amended. By leave of court trespass on a penal statute amended to one at common law. 1 D. & E. 783  
Green v. Ben-  
nett.—Ch.  
172, a 4,  
Sudbury v.  
Howe, ante.

A verdict may be amended by the notes of counsel, as well as of the judge; and if it be for the plt. or deft. generally, and misentered, it shall be amended. Cro. El. 866; 2 Cro. 185. 1 Com. D.  
457.

§ 20. So surplusage in a verdict shall be rejected as surplusage, though it be in an indictment for barrettry or other crime. 5 Com. D. Pleader, C. 28. 2 Saund. 308.

§ 21. No substance is within the statutes of *jeofails*, per Buller J., Dougl. 63. But it is said, Hob. 246, a defect in the count in substance, shall be amended, where it proceeds from the misprision of the clerk; as if the imparlance roll Ward v Hon-  
eywood—  
Carth. 113.—  
1 Saund. 228.

CH. 184. be mistaken contrary to the instruction given. And 1 Rol.  
Art. 2. 198. But no defect in form is cured by verdict at common  
law, not necessary to be proved in finding it. See art. 5.

In all amendments, at common law especially, it is always  
essential there be something by which to amend; and where  
there is not any thing by which to amend, no amendment  
can be made. "So even a matter not material, shall not be  
amended, where there is nothing by which it may be amend-  
ed;" and therefore, a motion refused to amend the *estreat* of  
a fine, for a misdemeanour in court, by adding the place  
where the man lived, because no record to amend by.

Bun. 24.

1 Com. D.  
466, Amend.  
Z.

§ 22. But a rejoinder in the paper book may be amended  
by the draught signed by the counsel; being verified by af-  
fidavit, this is something to amend by, though strictly not a  
part of the record.

8 Co case of  
Blackmore.  
—2 Haw. P.  
C. 192.—4 H.  
VI. 16.—6  
Mod. 274 —  
Cro. Car 144.  
—7 H. VI. 46.  
—Cro. El.  
619.—Stra.  
139, 734, 947.  
—42 Ed. III.  
6.—1 Mod 8,  
684.—2 Ld.  
Raym. 1441,  
—Stile 339.

§ 23. *A general principle.* It may be inferred from the  
several statutes of amendments and *jeofails*, that at common  
law, neither false Latin, the omission of a word, syllable, or  
letter, or other defect or variance from the established forms,  
were amendable; but there were then two material exceptions  
to this general rule: First, all mistakes were amendable the  
*same* term; as in the same term a *new* roll might be brought,  
and of course the same roll was amendable: Second exception,  
any subsequent part of the record could be amended when re-  
pugnant to a prior part in a subsequent term; or when a  
part was surplusage, and something on record to amend by,  
because the judges were not to record against a former re-  
cord; as stated in Blackmore's case, post, where it appeared  
by the record, that the *venire facias* &c. should have issued  
between A and C, but was by mistake issued between A and  
B, so amended; as it appeared by the record itself, this erro-  
neous issuing of the *venire* &c., was repugnant to the former  
parts of the record.

§ 24. In the English proceedings, and in making amend-  
ments &c. therein, it is observable that a subsequent part  
has repeatedly been set right, or amended, by a prior part  
in the record or case, according to the English practice;  
there, the party's instructions to the cursitor, are in many  
cases, the first step; and from these he makes out the origi-  
nal writ, and if this vary from them, it may be amended by  
them. So the office paper book is another step in the order of  
proceedings in the English courts, in many cases; and is in-  
structions to the prothonotary to enter up the imparlance  
roll; and therefore, if this varies from that, by that may  
this roll be amended. The principle seen in these instances,  
will be found to exist in scores of cases in the English prac-  
tice, which are no precedent in ours; nor would they be,  
were our statutes of amendments and *jeofails*, like the Eng

lish ; because the successive steps, parts, or stages of a cause, are often so very different, in our practice from those in the English.

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§ 25. Again it may be observed, that the English statutes of amendments and *jeofails*, passed by piecemeal, have been enacted altogether in reference to the successive and settled order of the parts and steps in pleading, and in the proceedings in a course of justice, in that country ; and as these parts &c. differ widely from ours, both in numbers and order of arrangement, those statutes, on this account also, if adopted here, will be found to have much less application to our proceedings.

§ 26. The order of the parts in civil actions, in the English proceedings, and so of amendments at common law, or by statute, are generally thus : 1. The instructions of the plt. or his attorney, to the cursitor to make out the original writ : 2. The process to bring the deft. in to answer : 3. The imparlance roll : 4. The plea roll : 5. The jury process : 6. The *nisi prius* roll : 7. The verdict : 8. The judgment : 9. The execution thereon : so every after, is amendable by a former part, at the proper time. The same principle holds in criminal proceedings at common law, and in other proceedings ; and is the ground work of most amendments ; but if the *first* step be wrong, it is evident there is nothing in the record by which to amend it, and there can be no amendment, but upon affidavit proving some mistake or fault amendable ; but amendments on facts proved by affidavits are rare. The same principle may apply in our practice ; but it will be found that there is but little sameness in the detail.

§ 27. There is another principle that holds in both countries, namely—neither the aid of a verdict, or an amendment can extend to matters of substance, or whatever is essential to the gist of the action, but only to defects in matters of form ; but all such matters of substance must be stated ; and if stated, may occasion a different verdict from that which is given when not stated. Hence, whatever is thus essential cannot be cured by verdict, or introduced by way of amendment, but by the express intent of some statute allowing the very amendment, or aiding the very defect. It is a general and essential rule of law, that all substantial facts be stated in proper time and place, so that the other party may seasonably know what in substance he has to answer to, and prepare accordingly ; and stated too, in such a manner, that he may traverse the whole or any part, as he pleases, of what is material. In fact, every material matter in every declaration or plea, must be so clearly and directly stated and averred, that the party may put it in issue if he chooses.

CH. 184. ART. 3. *English statutes of amendments and jeofails.*

## Art. 3.

§ 1. These were made necessary, not only by reason of the defects of the common law in this respect, but by reason of the singular conduct of judges; some of these having been punished for making improper amendments,—others took an opposite course, and sullenly refused all amendments, however small or proper, under a shew of fear and timidity. So in reality, in ages of ignorance and darkness, there came to be no amendments at all; and judgments perfectly just on the merits were reversed or annulled for the most trifling informalities only in the proceedings. This evil became intolerable, and hence parliament was induced to pass the numerous statutes of *jeofails* and amendment which follow.

14 E. III. c. 6. § 2. This act enacted that “no *process* shall be annulled or discontinued by the misprision of the clerk, in whatever place it may be, by mistaking in writing, one syllable or one letter too much or too little; but the same shall be amended as soon as perceived, by challenge of the party or otherwise, without giving advantage to the party that challenges the same because of such misprision.” This was one of the statutes of amendments.

11 H. IV. c. 3. § 3. This statute enacted “that records or process of pleas, real and personal, whereof judgment is given and enrolled, or things touching such plea, shall in no wise be amended nor impaired by new entering of the clerks, or by the record or thing certified in witness, or command of any justice, in no term after that such judgment in such pleas is given and enrolled.” Statute of *jeofails*.

9 H. V. c. 4. § 4. This statute enacted, after reciting the said act of 14 E. III., c. 6, that doubts had arisen in the construction thereof, “that the justices before whom such plea or record is made, or shall be depending, as well by adjournment as by way of error or otherwise, shall have power and authority to amend such record or process as aforesaid, according to the form of the said statute, as well *after* judgment in any such plea, record, or process given, as *before* judgment given in any such plea, record, or process, as long as the same record and process is before them.” Merely explanatory of 14 E. III., c. 6.

4 H. VI. c. 3. § 5. This act also recites the said act of 14 E. III., c. 6, and 9 H. V. c. 4, and makes the last perpetual, and enacts that the last shall have “force and effect in every record and process of the same, as well after judgment given upon verdict passed, as upon a matter in law pleaded.” Merely explanatory &c.

8 H. VI. c. 12. § 6. By this act it is enacted “that for error assigned in any record, process, or warrant of attorney, original writ or

judicial panel or return in any places of the same rased or interlined, or in any addition, subtraction, or diminution of words, letters, titles, or parcel of letters found in any such record, process, warrant of attorney, writ, panel or return, which rasings, interlineations, addition, subtraction or diminution, at the discretion of the justices of the courts and places in which the said record or process by writ of error or otherwise be certified, do appear suspected, no judgment nor record shall be reversed nor annulled." Further power to amend the misprisions of the clerks; by this act, justices have power to amend the clerical mistakes of their clerks and officers depending before them, as well by error as otherwise. (Statutes of Amendments.)

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8 H. VI. c. 16.

§ 7. This act recites the evils of mispleadings, and enacts "that if any issue be tried by a jury, in any action or suit at common law, in any of the courts of record, that the justices shall proceed to give judgment in the same; any mispleadings, lack of colour, insufficient pleading, or *jeofails*, any miscontinuance or discontinuance, or misconveying of process, misjoining of the issue, lack of warrant of attorney of the party against whom the same issue shall happen to be tried, or any other fault or negligence of any of the parties, their counselors or attornies, had or made to the contrary notwithstanding," and that such judgment shall stand and be in full force &c.—(Of *jeofails*.)

32 H. VIII. c. 30.

§ 8. By this act it is enacted, "that if any verdict be given in any action, suit, bill, plaint, or demand, in any court of record, the judgment thereon shall not be stayed or reversed by reason of any default in *form*, or lack of form, touching false Latin, or variance from the register, or other defaults in *form*, in any writ, original or judicial, count, declaration, plaint, bill, suit, or demand; or for want of any writ, original, or judicial, or by reason of any imperfection, or insufficient return of any sheriff or other officer; or for want of any warrant of attorney, or by reason of any manner of default in process, upon or after any aid, prayer, or voucher, nor any such record or judgment after verdict to be given, hereafter shall be reversed, for any of the defaults or causes aforesaid:" provided this act shall not extend to appeals of felony, "nor to any indictment or presentment of felony, murder, treason, or other matter, nor to any process upon any of them, nor to any writ, bill, action, or information, upon any popular or penal statute."—(Of *jeofails*.)

18 El. 14.

§ 9. This act refers to the said acts of 32 H. VIII. and 18 El. and enacts, "that if any verdict be given for the plt. or demandant, or for the debt. or tenant, vouchee, prayee in aid, or tenant by receipt, in any action, suit, bill, plaint, or de-

21 Jam. I. c. 13.

CH. 184. mand in any court of record, the judgment thereupon shall  
 Art. 3. not be stayed or reversed by reason of any variance in *form only*, between the original writ or bill, and the declaration, plaint, or demand, or lack of any averment of any life or lives of any person or persons, so as upon the examination the said person prove to be in life; nor for misnaming any juror, so that he appear to be the man meant to be returned; or by reason that the plt. in *ejectione firmae*, or in any personal action or suit (being a minor,) did appear by *attorney* therein, and verdict pass for him:” like *proviso* as in the said 18 El. (Of *jeofail*.)

16 & 17 Ch.  
 II c. 8.

§ 10. This statute enacts, “that after verdict in any action, suit, bill, or demand, in the courts of record, judgment thereupon shall not be stayed or reversed, for any want of *form* or pledges; or for want of *profert in curia* of any deed, or of letters testamentary, or of administration; or for the omission of *vi et armis*, or *contra pacem*, or for the mistake of the christian or surname of either party; sums, day, month, or year, in any bill, declaration, and pleading, being right in any writ, plaint, roll, or record, or proceeding in the same, to which the plt. might have demurred, and shewed the same for cause, or for want of *hoc paratus est verificare*, or *hoc paratus est verificare per recordum*; *prout patet per recordum*; for that there is no right *venue*, so that the trial was by a jury of the proper county or place, where the action is laid;” nor for that *ideo concessum est* is entered, for *ideo consideratum est per curiam*; “and that all such omissions, variances and defects, and other matters of like nature, not being against the right of the matter of the suit; nor whereby the issue or trial are altered, shall be *amended*, where such judgments are or shall be removed by writ of error.” *Quare*, if not a statute of amendment.

4 and 5 of  
 Anne, c. 16.

§ 11. This act for the *amendment* of the law &c. enacts, that when any demurrer shall be joined and entered in any action or suit, in any court of record within this realm, the judges shall proceed and give judgment according as the very right of the cause and matter in law shall appear unto them, without regarding any imperfection, omission, or defect in any writ, return, plaint, declaration, or other pleadings, process, or course of proceeding whatever, except those only which the party demurring shall specially and particularly set down and express, together with his demurrer, as causes of the same, notwithstanding that such imperfections, omissions, or defects, might have heretofore been taken to be matter of *substance*, and not aided by 27 El. c. 5, so as sufficient matter appear in the said pleadings, upon which the court may give judgment, according to the very right of the

cause; and therefore no advantage or exception shall be taken of or for any *immaterial traverse*, or of or for default of *entering pledges* upon any bill or declaration; or of or for default of alleging *the bringing* into court any bond, bill, indenture, or other deed whatever, mentioned in the declaration, or other pleadings; or of or for the default of alleging of bringing into court *letters testamentary, or letters of administration*; or of or for the want of averment of *hoc paratus est verificare*, or *hoc paratus est verificare per recordum*; or for want of alleging *prout patet per recordum*; but the court shall give judgment according to the very right of the cause as aforesaid, without regarding any such imperfections, omissions, and defects, or any other matter of like nature, except the same shall be specially and particularly set down, and shewn as cause of demurrer: 9 Anne extends the 4 and 5 Anne, and all the statutes of *jeofails*, to informations in the nature of a *quo warranto*, and proceedings thereon; and the 4 and 5 of Anne extends them to judgments by default, so that all defects are cured by judgment *on default*, which are cured by said statutes *after verdict*, but not those cured at common law on verdict.

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9 Anne, c.  
20.

§ 12. By this act, after verdict, judgment shall not be stayed or reversed for any defect in *form* or *substance*, in any bill, writ, original or judicial; for any variance in such writ from the declaration or other proceedings. 5 Geo. c. 13.

It has been thought best to cite these numerous acts *verbatim* (altogether not of great length) for two reasons: 1. It is clear that our American statutes of *amendments* and *jeofails* have been formed and worded in substance from these English acts; and whether these have been adopted in the United States or not, the English legal constructions of many expressions in them will very well serve as guides in construing many similar expressions in the said American acts: 2. Such an infinite number of amendments &c. and technical notions are involved in the numerous and comprehensive expressions in these English statutes, that it is impossible to have a correct idea of their true meaning from any *extracts*; but usually the very words must be well attended to. But it is to be understood, that these English constructions are useful to us only on general principles, and in leading cases, and not in that detail arising from a vast many different forms and rules of practice in England, not in use here.

§ 13. Generally the English determinations on these English acts deciding what is *form* or *substance*, a material variance or not, fault of the party or clerk, surplusage or not, material rasures or not; miscontinuance, discontinuance, misconveying of process, or misjoining issue or not: what is a

CH. 184. *criminal or civil cause, &c. apply in our practice, and in the*  
 Art. 4. *construction of our said acts. The reader will observe, among*  
 the English acts only 5 Geo. III. has any reference to matters  
 of *substance*, and this only after verdict.

ART. 4. *Massachusetts statutes and rules of court as to*  
*amendments &c.*

§ 1. It will be observed, that our ancestors came from England to America before all the above English statutes of amendments and *jeofails* were passed; that is, about the time that of 21 Jam. I. was passed, and before the omnipotent act, as some have called it, of 16 and 17 Ch. II., was enacted. In this state of these laws the Colony legislature of Massachusetts in 1641, enacted, "that no summons, pleading, judgment, or any kind of proceeding in courts or course of justice, shall be abated, arrested, or reversed, upon any kind of circumstantial errors or mistakes, if the person and cause be rightly understood, and intended by the court;" thus early our ancestors in Massachusetts passed this short but comprehensive act, on this subject, and it seems rather to be inferred that they intended it as a substitute for the said English acts on this subject; for "proceeding in courts and course of justice;" not only included declarations, pleas, &c., but bail, officer's returns, &c. As this act directed no amendments to be made, but declared that "*circumstantial errors and mistakes*," should not vitiate any proceedings "in a course of justice," it was not so properly a statute of *amendments* as it was a statute of *jeofail*; that is, according to many authors, a statute that *aids or cures* defects in judicial proceedings, at certain periods, *without any amendment being made*; though justice Blackstone thinks the statutes of *amendment and jeofail* were so called, because when a pleader perceived any slip in his pleadings, and acknowledged it (*jeofail*) he was at liberty to amend.

3 Bl. Com.  
407, 408.—

Mass. act,  
1701.

§ 2. This colony law was revised or rather re-enacted in 1701, in these words, "no summons, process, writ, judgment, or other proceedings in court or course of justice, shall be abated, arrested, or reversed, for any kind of circumstantial errors or mistakes, where the person and case may be rightly understood and intended by the court;" (and added) "nor through defect or want of form only; and the justices, on motion made in court, may order amendment thereof." This was properly a statute of amendments and *jeofails*; for the pleader by his motion to amend, acknowledged his slip or fault; *jeofail*; and the act directed the amendment to be made. A question might well arise, what was the effect of this act, if no amendment was moved or made; did it cure the defect? If not, then, as many defects in form have ever, in our practice,

been considered as cured by verdicts, on what law was this aiding defects but on the English statutes viewed as in force here? This act aided or cured in some form or other, three sorts of defects in pleading, and process, and proceedings in a course of justice: 1. Circumstantial errors: 2. *Mistakes*: must mean mistakes in form, not in substance: 3. Defect or want of form only.

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§ 3. This act already cited once or more times, is in the very same sense, and quite in the same words of that of the Province, passed in 1701.

Mass. act,  
Oct. 30, 1784.

§ 4. Rules of court as to amendments and *jeofails* in Massachusetts.

§ 5. By this act the Supreme Judicial Court has power to make and record rules and regulations, "respecting modes of trial, and the conduct of business," at discretion, not repugnant to the laws of the Commonwealth.

Mass. act,  
July 3, 1782,  
—Sec. 4.

This court made the following rule, to wit, "that in all cases, (except after joinder in demurrer) the plt. shall have leave to amend his writ and declaration, upon his paying the deft. his costs, or agreeing to a continuance, at the deft's. election, provided always, that the deft. shall have leave upon such amendment to plead anew."

April term,  
1780.

§ 6. This court also made a rule, directing when any action was continued to amend &c. the amendment, new declaration, special plea, &c. should be signed and filed three months before the term to which it is continued &c.

Rule, 1796,  
Feb.

§ 7. In this action the court recognized the said acts of 1782 and 1784, and observed its power "to order amendments is derived from statutes," having power at common law but in a very few cases, and those only where there is something on record to amend by; and that an order for amending a declaration is not a cause for filing a bill of exception, on the act of 1803, ch. 93. But the common law did not confine the something to amend by, to the record. See cases above cited; and art. 9, s. 10; art. 11; Ch. 185, a. 3, s. 11.

3 Mass. R.  
208, Haynes  
& al. v. Morgan.

§ 8. *Other American statutes &c. as to amendments &c.* This act is the same in substance and words as the Massachusetts act of 1784, except this act of the United States is expressly confined to civil causes; but will extend to penal actions, as they have been adjudged to be civil actions.

Act of the  
Unit. States,  
Sept 29, 1798,  
cited Ch. 180,  
a. 9.

§ 9. It appears by the very comprehensive expressions in these American statutes, that have existed since 1641, that when only circumstantial errors and matters of form exist in the proceedings, and the essential parts or matters of substance are right, they shall stand, and such circumstantial mistakes be amended on motion. As to what is substance or

CH. 184. form, see other chapters. As Ch. 180, a. 9 &c. Or what  
 Art. 5. is essential or circumstantial.

§ 10. It may be observed, on all these statutes, that they aid only matters of form in civil actions, or circumstantial errors or mistakes, and not matters essential to the action or defence or of substance, even in civil actions; and they have no relation to suits properly criminal. Hence, if any matter of substance or essential to the action, or to the defence, in civil actions, be not alleged, it is not cured by pleading, by verdict, or judgment, but may be moved in arrest of judgment, or assigned for error; but matters of form or circumstance in civil actions, may be cured, by pleading, by verdict, or judgment; and error now lies only for some material mistake; some defect in, or want of substance.

3 Bl. Com.  
406.

6 Cranch,  
254, Sheehy  
v. Mandeville.—

6 Cranch,  
206, Marine  
Ins. Co. v.  
Hodgson.

§ 11. The Supreme Court of the United States will not direct the court below to allow the proceedings to be amended, which have been had in that court; and after a cause is remanded from the Supreme to an Inferior Court, it may receive additional pleas or admit amendment; and amendments may be allowed by the court below, after judgment on demurrer affirmed in the Supreme Court of the United States. Fatal error in the declaration. 6 Cranch, 221, 225. *Quare*, if amendable.

Gardner v.  
Brown, 7 Id.  
389.

§ 12. Verdict for the plt. on one count in an action on the statute of usury; on other counts for the deft. Christian name of one person mistaken, allowed to be amended at common law, by filing a new bill, then amending the issue roll. The *nisi prius* roll was right.

ART. 5. *Common law and said statutes, material distinctions.*

§ 1. In proceeding on this subject of amendments and defects in pleadings cured, it is very material to keep up the true principles of distinction, between those at common law, as including criminal as well as civil cases, and those on the said statutes, usually understood to be confined to civil causes only. There are other reasons for preserving the true distinction also, which will appear in the sequel.

1 Saund. 222,  
228, Stennel  
v. Hogg, and  
W'ims' notes.  
—Cro. Car.  
49.—1 Mod.  
292.—1 Salk.  
365.—Com.  
R. 116.—2  
Mod. 302.—3  
Wils. 275.—  
Dougl. 668.—  
1 D. & E. 145.  
—3 D. & E.  
25, 147.—4  
D. & E. 472.—7 D. & E. 508.

§ 2. 1st. The true principle on which a verdict cures defects at common law, namely, if there be any defect, or fault any omission, or imperfection in pleading in form, or substance, fatal on demurrer, yet if the issue be so formed or joined, as on the trial of it, necessarily to require proof of the facts omitted or badly stated, and without which it cannot be presumed, the judge would have directed, or the jury would have found the verdict they have found, then such defect, or fault, omission, or imperfection, is cured by the verdict by the common law; or such defect is no *jeofail* after a verdict is found in the case, which fairly implies that such facts were

proved in the trial of necessity, as otherwise, or if not proved, the verdict could not have been directed or found. This is the general principle; but subject to the limitations herein after expressed; especially, the rule that the verdict must be according to the evidence, and that according to the allegations; also, the rule, that what is implied need not be alleged; and is traversable &c.

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§ 3. *Cases.* Debt for rent, by the bargainee of a reversion, he, in his declaration, omitted to lay the tenant's attornment, then necessary (being before the 4 and 5 Anne) to complete the bargainee's title. The deft. pleaded *nil debet*, and verdict for the plt.; and held, this omission was cured by the verdict, by the common law. But Serjeant Williams observed, that such omission is fatal on a judgment by default, since the said statute of Anne; "for it is clear, that unless the tenant had in fact attorned, the plt. was not entitled to recover." "It is not alleged in the declaration, the tenant had attorned;" and at least it was as probable he had *not*, as that he *had*; and there is no evidence which was the fact. "Upon what ground then, can the court presume any attornment? The judgment by default affords none; for that only admits such facts as are alleged." "Hence, if such facts should be held to be aided after a judgment by default, it might frequently happen that the court would give judgment for the plt. where he is not entitled to recover." "But where a verdict has established the grant, that is a sure ground, whence the court can presume attornment; because without proof of it, the plt. could not have made out his title as bargainee of the reversion." Williams further observed, that where the grant of a reversion or other hereditament lying in grant, and to be conveyed but by deed only, is pleaded, but is not alleged to have been by deed; or if a feoffment be pleaded without livery, so that the grantee or feoffee does not shew in himself, a perfect title, yet if the grant or feoffment be put in issue, and found by the jury, the verdict cures such imperfection, by the common law. But such defect is a fatal objection after a judgment by default; as the deft's. default confesses nothing but what is stated in the plt's. declaration. Hence, a verdict impliedly finds a fact (not alleged) not admitted by default; and as is conceived, not admitted by demurrer. As also in *Collins v. Gibbs*, stated in art. 7, in which case the deft's. promise was on a condition precedent, and this was not averred to be performed, by the plt. in his declaration. Judgment on default, and arrested for this omission, not cured by this judgment; for, says Williams, "the objection holds exactly the same as if it had been on demurrer." 2 Burr. 899. But

1 Str. 78.  
2 Show. 233,  
*Hitchins v.*  
*Stevens.*

*In Stennel v.*  
*Hogg.*

*Collins v.*  
*Gibbs.*

CH. 184. "such omission is cured by the verdict, by the common law." Williams' Note, 1 Saund. 228, c.  
Art. 5.

1 Saund. 228,  
c. 230. b.  
Skinner v.  
Gunton.

§ 4. Case against three defts., that they by a conspiracy had among them, maliciously prosecuted the plt. In this action it is material to allege, the first suit is terminated; but held, the want of this averment is cured by the verdict; and it seems to be Williams's construction, that it did so on the principles of the common law; but the court did not seem to consider it as material that this fact was proved or not, as the verdict found the deft. levied the plaint, caused the plt. to be arrested on it without cause; so a malicious prosecution without cause, was in fact found. Numerous other cases are cited or found, to establish the general principle, that a verdict by the common law cures an omission, when the verdict itself affords a fair inference such omitted facts must have been proved at the trial, though not alleged in the pleadings.

In Stennel v.  
Hogg. - Cro.  
Jam. 44,  
France v.  
Tringer.

§ 5. 2d. But the verdict has no such effect whenever it does not imply, or afford a fair inference, that such omitted facts were proved at the trial. But another rule governs, namely, if any defect or fault, omission, or imperfection, though only in form, "in some collateral parts of the pleading, that were not in issue between the parties, so that there was no room to presume that the defect or omission was supplied by proof, a verdict did not cure them by the common law." As in this case, in which a prescriptive right of common (in trespass) was replied and put in issue, and a verdict found it. But the plt. omitted to aver, 1st, that his cattle were in the part of the land in which he claimed common: 2. That they were *levant* and *couchant* on his land. Held, these omissions were aided by the verdict finding this right; for the court said, after verdict, it shall be intended, the plt's. cattle were in that part of the land in which he had common; for otherwise the deft. might have taken advantage thereof by demurrer or rejoinder; but when he joins and traverses the prescription, and it is found against him, "the want of averment, and all other faults are aided by the statutes of *jeofails*." Williams says, the verdict for the plt. did not cure these defects; "for the only point in issue, was the prescriptive right of common, and therefore, the fact of the cattle being *levant* and *couchant* upon the plt's. land, or not, was not at all necessary to be proved before the jury;" but after verdict, were aided by the statutes of *jeofails*, and are now after a judgment by default, by the statute of Anne, which cures all defects, cured after verdict by those statutes.

1 D & E. 141,  
146, Speires  
v. Parker.

§ 6. 3d. The matter omitted or badly stated, must not only be impliedly found by the verdict, and so affording a fair

inference it was proved at the trial ; but it must also be impliedly included in the facts stated in the declaration, according to another general rule in pleading, to wit, that the verdict must be according to the evidence, and that according to the allegations ; and accordingly, this case was decided ; which was debt for several statute penalties against an officer for impressing seamen, not liable to be impressed ; and the plt. in his declaration averred, they had not deserted from his majesty's ship *Diamond* ; whereas on a true construction of the statute, on the subject, he should have averred in his declaration, that they had not deserted from any of his majesty's ships of war ; this he omitted, and after verdict, for him, judgment was arrested for this omission. It was argued for the plt. that as the fact, they had not deserted from any of his majesty's ships of war, was essential to the plt's. recovery, and to a verdict for him, it must after such a verdict, be presumed this fact was proved at the trial, as otherwise, such a verdict could not have been found. But the court said, that " nothing is to be presumed after verdict, but what is expressly stated in the declaration, or what is necessarily implied from those facts which are stated." In this case in connexion with the preceding cases, we see the true principle established ; namely, that the verdict to cure defects in badly pleading facts, or the omission of them, must not only imply or afford a fair inference they were proved at the trial, but also, that they were " necessarily implied from those facts which were stated" in the plt's. declaration ; thus shewing both essential ; for in this case, as the jury could, on the law of the case, not have found their verdict as they did, for the plt., if the fact they had not deserted from any of his majesty's ships of war, was not proved at the trial. This verdict for the plt. clearly implied, and afforded a fair inference this fact was so proved ; yet the court said, this was not enough to cure the defect or omission, but that it was also necessary that this fact should be impliedly stated, or contained in the declaration ; but it was not ; but it was a fact collateral and by itself, no way implied from any facts the plt. did state or allege. Hence, it came within the rule stated in *France v. Tringer*, in connexion with the rule the evidence follows the allegations &c.

§ 7. The same principle evidently prevailed in the above cases of attornments, the feoffment and grant ; for when the party pleaded a grant of a thing lying in grant, so not to be conveyed but by deed, and attornment, or feoffment, in its nature including livery, though he did not say by deed, or with attornment, or livery, yet as these were actually parts, and material parts of such conveyances, in their nature, and

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without them the grant or feoffment was in fact, no grant or feoffment, each deed, attornment, or livery, was "necessarily implied from the facts" stated; that is, the mere plea of a grant of an incorporeal hereditament, or of a feoffment, impliedly included such parts. Though Williams noticed the case of *Speires v. Parker*, he did not appear to give it its due weight in his notes on *Stennel v. Hogg*, and *Skinner v. Gunton*.

§ 8. 4th. *How far does a judgment by default cure a defect that consists in badly pleading a fact, or the omission of it?* According to *Collins v. Gibbs*, and other well decided cases, such judgment leaves the defect where a demurrer does; that is, each confesses facts well pleaded, and these only. Does this confession admit only facts expressly alleged? Or does it also admit those "necessarily implied from those facts which are stated?" In this respect there is some uncertainty; for on the one hand it is a rule in pleading, that "whatever is necessarily implied need not be expressed," and is to be understood; what is fairly to be inferred from what is stated, the court will intend and understand; and a fact or seizin implied may be traversed; as Ch. 180, a. 10. Hence, seizin is alleged, sole seizin is intended, and sole seizin may be traversed, though only implied or intended. If we were to consult these and other like authorities alone, it would seem that any fact or matter fairly implied, and so to be intended, and so traversable, in the plt's. declaration, must be admitted by demurrer or by default, because a fact so implied seems to be sufficiently stated; yet this does not appear to be the case on a view of all the authorities on this subject. In *Stennel v. Hogg* (notes) it is said, that judgment by default "only admits such facts as are alleged;" and that such judgment would not admit the attornment in *Hitchins v. Stevens* above. So if the plt. claims by a conveyance by feoffment, but states no livery, the same authority holds a judgment by default does not admit livery, yet livery seems to be implied in a conveyance by feoffment, as in fact there can be no conveyance by feoffment without livery, as livery is the very gist of this kind of conveyance.

§ 9. On the whole, the books place this judgment on the ground of a demurrer; and should the deft. demur, and shew for cause, the plt. makes title by a conveyance by feoffment without stating livery, the demurrer must prevail. But would a general demurrer? It would if substance, and the want of stating livery is want of stating substance.

ART. 6. *Adjudged cases of amendments &c.*

§ 1. Rule 1. *Amendment may be made after error brought.* *Assumpsit* for monies paid by the plts. as executors; also

2 H. Bl. 810.—  
1 Saund. 49.  
—5 Com. D.  
321.

2 Salk. 629,  
630.

3 D. & E. 659,  
660, Petree  
& al. ex'rs. r.  
Hauing.

for monies paid by the testator to the deft's. use; also for money had and received by the deft. for the use of the plts. as executors; also for money had and received for the use of the testator, all in four separate counts. Pleas, never promised, and statute of limitations. Verdict for the plts. on the first issue, and no notice taken of the last. The deft. brought a writ of error in the House of Lords: 1st, Because no verdict was given on the second plea: 2. Because these demands could not be joined. Joinder in error. The plts. then moved to amend by the judge's notes, by adding a verdict for them on the second plea &c., and the amendment was allowed, though it was objected, that error was brought and the plts. had joined in error; but the court said the record remained in court, though a transcript had been sent to the House of Lords. Hence, something remained by which the court could amend.

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§ 2. In this case the verdict for the plt. found a sum beyond the amount *ad damnum* laid in his declaration, and error was brought; and the plt. was allowed by way of amendment to release the surplus. Like case, 1 H. Bl. 642, *Pickwood v. Wright*; 2 Dall. 184; but 2 Stra. 1110; 2 W. Bl. 1300; 3 Hen. & M. 502, *Palmer v. Mill*.

Essex, June term, 1796,  
*Parsons v. Mc Master*.

§ 3. The plt. recovered in debt; and for want of a warrant of attorney for the deft. he brought error; and the court allowed the original plt. to amend by filing a warrant of attorney, for the original deft., now plt. in error, and ordered the clerk to enter it accordingly. Amendment after error brought.

2 Dyer, 226,  
*Killegrew v. Trewynnard*.  
—2 Stra. 1182.

§ 4. So records amended after error brought in other cases; as Dougl. 114; 5 Burr. 2730; 1 D. & E. 783; 3 D. & E. 749; Poph. 102; 1 Com. D. Amendment, 2 A. And after error assigned to the same point. Latch. 162; Ld. Raym. 65, and post, *Smith v. Fuller*; Salk. 49; 2 Stra. 807, 892, 902; 1 Wils. 303; 2 Bos. & P. 275, and other cases, post.

5 Johns. R. 350.

§ 5. Plt. had judgment in case for a false return &c.; allowed to amend, by adding a continuance and *misericordia*, after error brought on 8 H. VI. c. 12; and added the plt. in error may assign errors *de novo* in such case.

2 Stra. 1127;  
*Williams v. Middleton*, 7 D. & E. 618.

§ 6. Judgment roll altered from *ought to*, to *do recover*, after error brought, and *in nullo* pleaded. 1 Com. D. Amendment, 2 A.

Barnes, 71.

§ 7. Judgment in the B. K. was affirmed in the Exchequer Chamber, and costs in error given; and both defts. were taken in execution for the whole sum, including the costs of the writ of error, as well as the original sum recovered. The court allowed the plt. to amend his execution, as to the

2 D & E. 737,  
*Larocke v. Warbrough*.  
—1 H. Bl. 544, *Meyer v. Ring*.—9 East, 316.

CH. 184. deft. who did not join in the writ of error, by altering it to the original sum recovered. Amendment after error brought.

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2 Stra. 837.

§ 8. These cases and the express words of the above statutes, English and American, amply shew amendments may be made after judgment and error brought in the proper actions; and of course, at prior stages of the suit.

See art. 12.

§ 9. Rule 2. *Amendments may be made after demurrer joined*, at the discretion of the court generally.

Cowp. 575,  
Sayre v.  
Mions.—3  
Johns. R. 140.

§ 10. In this case the plt. had leave to amend his replication, by concluding it with an averment, instead of to the country, after a special demurrer to it, joinder in demurrer, and that argued at large, and judgment of court thereon. Amendment after argument.

4 D. & E. 228,  
Evans q. t. v.  
Stephens.

§ 11. But in this *qui tam* action, the court refused to allow the plt. to amend after demurrer; and said, there was no instance wherein an amendment had been allowed as to the parties to the suit in this kind of action.

Peabody v.  
Tyler.

§ 12. So in this Massachusetts action before stated, the court allowed the party to amend, after demurrer joined and argued; but not the return of a writ of error after assignment of errors. 3 Johns. R. 141.

2 Stra. 846.  
Hatton v.  
Walker.

§ 13. In this action an amendment was allowed after a special demurrer and joinder. Deft. concluded his plea with *unde petit judicium &c.*, amended to read, *actionem manutenere debet*, by draught under the counsel's hand. Like case, Cro. Car. 144. These cases sufficiently shew the court has power to allow amendments after joinder in demurrer, and that argued.

§ 14. But these, as well as the following, also shew the court will exercise its discretion in this respect.

1 Mass. R. 96,  
Holbrook v.  
Pratt.—2  
H. & M. 595.

§ 15. *Trespass; quod cum &c.* Deft. demurred generally, and the plt. joined in demurrer. Held, *quod cum*, bad on general demurrer. Plt. moved to amend, but the court refused the amendment, as it was after a general demurrer; so viewed as a defect in substance.

1 Mass. R. 97,  
Walker v.  
Maxwell.

§ 16. But in this case an amendment was allowed of a plea, after joinder in demurrer. 1 Mass. R. 104: and after the demurrer was argued.

§ 17. Many other cases might be added to shew the court exercises its discretion to allow amendments, or not, after joinder in demurrer, according to the circumstances of the case.

7 D. & E. 699,  
Rex v. Gram-  
pond Corp.

§ 18. And generally all amendments are within the discretion of the court, and are allowed in furtherance of justice, under the particular circumstances of the case.

Fox v. Wil-  
braham.

§ 19. Leave to amend a plea in bar after argument. 3 Wils. 295. But denied after a demurrer and argument. 1 Ld. Raym. 668.

§ 20. Before a party be defaulted for not joining in demurrer, he may amend his plea demurred to, but he cannot add a new one. CH. 184. Art. 7.

Amendment allowed after special demurrer. So 2 Ld. Raym. 1137. An amendment allowed by striking out the aforesaid deft., likewise, after the cause was in the paper, if the plt. avers the *similiter*, and he demurs without striking it out, and the demurrer book is made up with it in, the court will let it be struck out after demurrer has been argued. In an action on a bill of exchange, held the plt. by leave of court may strike out a special as well as a general indorsement. 1 Johns. Cas. 246, Doyle v. Moulton.—2 Stra. 934. 1 Dallas, 193.

ART. 7. *As to what amendments the court will allow or not.* See art. 12. Enough has been said to shew how far the court will allow amendments or not in point of time.

§ 1. It now remains to see in what cases further the court will allow them or not, according to the nature of the amendment proposed, and the circumstances of the case.

§ 2. *Cases.* One of the plts. died before interlocutory judgment; but the action went on to execution in the names of both; the court allowed the plt. to amend by suggesting on the record the death of the other plt. before such judgment, and to amend his execution without paying costs. 6 D & E. 577, Newham v. Law.—2 Burr. 1090.

§ 3. As to amendment *on default*, judgment by default, and a writ of inquiry of damages executed, deft. moved in arrest of judgment, alleging his promise was on a *condition precedent*; and this not averred to be performed, judgment arrested; and the court said, this judgment on default put the defect on the same ground a demurrer would; and the distinction of defects being helped or not, was only before or after *verdict*. 2 Burr. 899, 900, Collins v. Gibbs. but 4 and 5 Anne.

§ 4. If *on demurrer* the party once amend, the court will not give leave to amend again on a second demurrer; and amendment after demurrer denied in a hard case against executors. 1 H. Bl. 37. 2 H. Bl. 561, Kinder v. Paris.

§ 5. Held in this case, that an *information* may be amended in a point to which the deft. has excepted by a plea in abatement; same point, Stra. 739; 2 Ld. Raym. 1472; same, Stra. 606; amended after plea pleaded, Salk. 47, Rex v. Harris. 2 Ld. Raym. 1307, Queen v. Stedman.

§ 6. Amendment of a *declaration* refused after verdict; but a declaration in replevin was amended after a plea in abatement, and a decision of the court thereon; 1 Stra. 11, Garner v. Anderson. 2 Wils. 147.

§ 7. A *clerical mistake* in a return of a *mandamus*, amended after the return was filed; but post, Ch. 185, a. 8. Dougl. 135, Rex v. Lyme.

§ 8. In this action a judgment *de bonis propriis* was amended to a judgment *de bonis testatoris* &c. after error was brought. So the attorney's name in the plt's. warrant was altered to Dougl. 114, Richards v. Brown.—6 Burr. 2730, Short v. Coffin.

CH. 184. make it correspond with that in his declaration; and after  
 Art. 3. this variance between the warrant and declaration was assigned for error. So in debt *ex assensu suo* may be added, though assigned for error. So omissions in matters of form may be amended after error brought; in substance, 3 Johns. R. 257; count on the covenant of seizin, plt. was allowed to add a count on the covenant for quiet enjoyment; the same deed.

1 East, 369,  
 Solomons v.  
 Lyons.

1 Mass. R.  
 233, Wells &  
 al. exrs. v.  
 Dench.

1 Mass. R.  
 433, Leigh-  
 ton v. Leigh-  
 ton.

8 Co. 160 b.  
 in Black-  
 more's case.  
 —1 Com. D.  
 437.—Rol.  
 Abr. 208, 209.  
 —1 Co. 34.—  
 Stra. 141,  
 Rex v.  
 Bolton;  
 Needham v.  
 Grano.

6 Co 35, case  
 of Playter.—  
 1 Johns. R.  
 276.

1 Com. D.  
 464.

§ 9. If the deft. plead a *sham plea*, and the plt. makes a bad replication, he will be allowed to amend it without paying costs, after demurrer joined on this replication.

*Executions.* The sum was mistaken in an *execution* issuing from the common pleas, which that court would not amend; on an application to the Supreme Judicial Court, it ordered the clerk of the common pleas to attend with the record of the case, and directed him by it to amend the execution in the presence of the Supreme Judicial Court. So a writ of execution amended after executed. 2 W. Bl. 836; 3 Wils. 454.

§ 10. This was an action for a legacy brought against a person supposed to be *executor*, but who was not; the court allowed the plt. to amend and alter his action, so as to be against the deft. as *devisee* of the real estate charged with the payment of the legacy; a declaration amended after adjudged insufficient. 1 Day's case in error, 206.

§ 11. *Words defaced* amended; as where a record was so by moisture. So words obliterated by negligence in keeping, and amended by the other parts of the record not obliterated. So if any part of the record be stolen, it may be supplied by other parts of the record, but not if there be no other parts of the record, or an exemplification to do it by; where the officer lost the original record out of his pocket, the court ordered a new entry to be made; he was carrying it to the House of Lords, on a writ of error brought; the like was done on the loss of the roll by an attorney.

*Scire facias* not amended, Salk. 52; amended, 1 Ld. Raym. 183, 548; 8 Mod. 313; 2 Ld. Raym. 1057, 1066; 6 Mod. 263, 310; 2 Stra. 892, 1165; 1 Stra. 401, amendable or not.

ART. 3. *Mistakes of the clerk or of the party.*

§ 1. There is a material distinction between the acts of the clerk and those of the party; the slips and mistakes of the former are most favoured; and their duties are very different, for it always belongs to the party to furnish the *matter or facts* proper in the case, and to the clerk to draw them into form; but it is not every mistake of the clerk that can be amended; as where a writ is in the *debet* and *detinet*, where it should be in the *detinet* only; this is the clerk's

fault; but because it is a matter of *substance* that is in the point of the action, and not want of *form*, it cannot be amended; also, it is the clerk's *ignorance*, not his *misprision* or slip; but is now aided after verdict by 16 and 17 Ch. II. So *substance* is aided; yet by that statute a verdict cures want of *form*, and certain matters named.

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Art. 8.

1 Com. 439.  
—6 Mod. 278.

§ 2. *Defect of information.* A default which proceeds from a defect of good information of the *party*, cannot be amended by the English practice, as if A bring an action of the case against B, for stealing the horse of *him* A, where it was meant *him* B; this is not amendable; for it is *matter of fact*, which might be true, and a real case, and the amendment would make another case.

1 Com. D.  
Tit. Amend.  
R. 2.

Judgment recovered in the the common pleas of *one* messuage only, error thereof in the Supreme Judicial Court, and the *scire facias* to assign errors was *quare executionem habere non debet* of a judgment in ejectment for *two* messuages; plt. in error, pleaded *nul teil record*; deft. moved to amend, and refused; and Holt C. J. said, nothing appears to be vitious or informal to need amendment, and there may be a good judgment that agrees with it; *the writ is good, though improper for the purpose*, and we cannot put a deceit on the deft. and make his plea false, when it was true.

Salk. 52,  
Bucksom v.  
Hoskins;  
same case, 6  
Mod. 263.

§ 3. Held, a writ of inquiry of damages, ordered to be issued, and returnable *on one day*, made by the clerk returnable *on another day*, and served on the return day ordered, was amendable by the rolls, and that the service on the said return day was well; for a writ may well be served on its return day; many cases cited. At the time this writ was served, it was not authorised by the order, and was made valid by the amendment only.

Cro. El. 760,  
Wolley v.  
Mosely.

In this case of an information for a seditious libel against the deft., author of the *Observer*, the *distringas* was erroneously tested the day after the return of the *venire facias*, and held, after very laboured arguments at the bar and bench, that this test was not amendable. At first the judges were divided. In this case, a very large part of the principles of amendments and *jeofails* were examined, and scores of authorities cited; the *distringas* was tested a day too late by the clerk's mistake, and one day after awarded, motion in arrest of judgment; the ground here was a *discontinuance* of process at common law by the clerk's testing and issuing the *distringas* a day later than it was awarded by the court on the record.

6 Mod. 269  
to 287, Queen  
v. Tutchin.

§ 4. Holt's opinion in this case, which prevailed, was (among other things) page 281, if in a *quo warranto*, a subject make a *limited* disclaimer, and the clerk enters a *general* one,

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this ought to be amended. So if an original indictment be right, and the clerk enters it wrong on the plea roll, it shall be amended: "and it has been the general opinion, that the statutes of *jeofails* or *amendments* did not extend to *pleas of the crown*," page 285; in the case at bar, it is not amendable. It is an omission in the point *material*, viz. in the *teste*, which by law should have been the 23d of the month, and is the 24th; deft. had day in court 23d, but the 24th he and the jury were out of court. So it is a writ awarded behind his back, and without warrant of the court; is another writ than what the court awarded; so no authority to distrain the jury, so none to try the cause. "Here is a *material* variance between the writ awarded, and that by which the jury were distrained;" "this is a good writ in itself;" and the meaning of 8 H. VI. "was to amend bad writs, and not to alter a good writ, so as to adopt it to a particular purpose." If on the return of one writ, another is to be awarded, this other must bear *teste* of the return of the first; "or else all is *discontinued*;" *nescience* in the clerk is not aided. *Quære*, if this was a mistake of the clerk in point of skill, it does not appear but that he thought this writ a good one; "and if it be *nescience* in the clerk, it is not helped even by the statute of H. VI., though a *civil* action before the statute of *jeofails*." *Venire facias de novo* awarded.

Stra. 136,  
Phillips v.  
Smith.—  
Salk. 88.

§ 5. The deft. stiled himself *bugi*, instead of *burgi*, and he was allowed to amend his plea, even after a writ of error was brought. And so the plt's. fault in his declaration by omitting the words *per attornatum suum*, may be amended by the plea roll.

Stra. 1214,  
Rex. v.  
Roberts.

§ 6. If the clerk mistake the christian name of a juror, the court *ex officio*, will amend, if he acknowledge he is the person summoned, though the deft. oppose it. The clerk called him by the name of *Henry*, and he informed the court he was christened by the name of *Harry*, but owned he was the person summoned; but it is not stated by what name he was summoned: amended on 8 H. VI., c. 12, and c. 15.

ART. 9. *Matters aided by plea of the other party; by verdict.*

8 Co. 262,  
Turner's  
case.

§ 1. *Defects aided by plea.* Turner, executor, brought debt against Lawrence & al. administrators of Booker, on his bond £100 to the plt's. testator. Deft. pleaded former judgment in bar; this bar was insufficient, as it did not shew the court (inferior one) had jurisdiction, in which said former judgment was recovered; and as the declaration in said former action was debt for £100, but named no bond. So no bond was to be intended; so the deft's. simple contract to pay the judgment was void; but the deft. in his bar confessed the debt was by bond; but held, that did not aid the declaration

and make it good; also, resolved: 1. "When the declaration wants *circumstance* of time or place &c., it may be made good by the bar:" but 2. "When a declaration, bar, or replication, &c. wants *substance*, it cannot be made good by the other's plea:" 3. If the plt.'s. replication had been bad, yet on the whole record he should have judgment; because the bar was bad *in matter*: 4. There is a difference, "when by the replication it appears the plt. has no cause of action" then he cannot have judgment, though the bar be bad; but when the def't's. bar is bad *in substance*, "and the plt. replies, and shews the truth of his case, whereby he shews no matter against himself, but matter explanatory or perhaps not material, then the court shall judge on the whole record, and (the declaration being good) for the insufficiency of the bar without any regard to the replication, judgment shall be given for the plt.;" as if the def't. pleads a grant by letters patent in bar, not sufficient, the plt. by replication shews another clause in the said letters patent, which clause is not material, and the def't. demurs, the plt. shall have judgment. Here was a good *declaration* in itself intitling the plt. to judgment; and the *insufficient* bar was not against him, nor did he subsequently state any matter shewing he was not intitled to judgment.

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§ 2. *Matters aided by verdict &c.* Rule, an omission or mistake in pleading may be set right or cured by a *verdict*; for to support it, the court will intend, that the omission or mistake was set right, or the omission supplied by *evidence*; as if not, there could have been no verdict.

5 Bac. Abr.  
320.—1  
Saund. 227,  
Stennel v.  
Hogg.

*Cases.* As if a declaration charged a trespass, and omit the day when committed, this would be bad on a demurrer; but is cured by a verdict; *as the day is not material*, the court will intend it was proved on a day before the action was brought.

Salk. 662,  
Ch. 223, a.  
11, s. 43.

§ 3. So after verdict for the plt., holder of a bill, the court will intend there was evidence he paid the monies to the last endorsee, though this fact be not alleged in his declaration; so a grant *by deed* shall be intended after verdict for the grantee, where a deed is necessary, though the grant be not alleged to be by deed; for unless a deed had been proved, the jury could not have so found, the deed by law being essential.

5 Bac. Abr.  
320.

§ 4. An omission to allege a thing in pleading which is essential to the action, is never cured by verdict; for every such thing being traversable, must be alleged, that it may be put in issue; as if a declaration in trespass by a master for beating his servant, do not charge that by reason of the beating, the plt. lost his service, the omission is not cured by the verdict; for the loss of the service is the gist of the action. Comparing this case with the preceding one of the deed, the

5 Bac. Abr.  
321.

CH. 134.  
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distinction seems to be this, the verdict may cure the omission of a matter essential, as the deed in said case, if not traversable; but does not cure the omission of a matter essential, as alleging said service, if traversable; but if so, it must be averred that the other party may put it in issue, if he chooses. Here the omission to state the deed, though substance, was cured. The plea of not guilty in covenant is aided by verdict. 1 Hen. & Mun. 153, Hunnicut & al. v. Carsley.

Salk. 662,  
Buxendin v.  
Sharp.—  
3 Dallas, 365.

§ 5. So trespass for keeping a bull accustomed to run at persons, the omission to charge the deft. knew it, is not cured by the verdict. Nor does a verdict cure defects in criminal cases. Declaration omits to aver the value of foreign money cured by verdict finding it; probably viewed to be not a traversable fact.

1 Johns. R.  
453, 471.—1  
D. & E. 141.  
—3 Mod. 265.  
—2 Saund.  
228, notes.

§ 6. Matters aided by verdict are found in many parts of this work, stated in connexion with other matters; as Ch. 117, a. 5, local action in the wrong county; Ch. 123, a. 3. Sundtry cases, Ch. 146, a. 7, in connexion with arresting judgment; where the effect of a verdict to prevent a judgment being arrested or not after appears. So Ch. 182, in which the principles and nature of verdicts are considered.

2 Stra. 807,  
Mullet v.  
Denny.

§ 7. *Further cases.* Ejectment against two, saying they *intravit, expulit, et amovit*, allowed to be amended after verdict; and 2 Salk. 454. So where a *distringas* issued with a *blank* in it, for the cause of action, after verdict was allowed to be amended and set right. 2 Ld. Raym. 1143, Bullock v. Parsons.

1 Ld. Raym.  
133, Walker  
v. Brook.

§ 8. As the verdict was entered on the *postea*, it found neither the affirmative or negative of the issue joined, but a fact irrelevant. This was clearly the mistake of the officer who made the entry: allowed to be amended.

2 Bos. & P.  
342, Manners  
q.t. v. Postum.

Action for taking usurious interest. The jury, by mistaking the date of an instrument, created a variance in their special finding, as to which the evidence afforded no foundation. The verdict amended by the judge's notes, so not by the record.

1 H. Bl. 78,  
Spencer v.  
Goter.

§ 9. The court (of C. P.) said, that they could not alter a verdict, unless it appeared clearly on the face of it, that the alteration would be according to the intention of the jury.

1 Bos. & P.  
320, Williams  
v. Breed.—  
Also Dougl.  
376.—1 Com.  
D. 457.

§ 10. The jury found a general verdict on two counts; one bad. By the judge's notes it appeared, the jury calculated the damages on evidence applying to the good count only. Verdict amended by entering it on the good count; the evidence was given applying to the bad count also.

1 Salk. 47,  
Rex v. Keate.

§ 11. A verdict may be amended by the notes of the clerk, in civil actions, not in criminal. 1 Bac. Abr. 102.

A special verdict found a bankrupt bought and sold great quantities; amended as to the quantities, on affidavit that they were proved at the trial. 1 Com. D. 456, 468. CH. 184. Art. 10.

ART. 10. *Amendments by release of part &c.*

§ 1. The general rule is, if the plt's. declaration be good for part, and a verdict find more for him, he may release the surplus, or other part in general, whenever distinguishable. 2 Bac. Abr. 224.

§ 2. *Cases.* As if the jury give more damages than the plt. declares for, he may release the surplus, and take judgment for the sum declared for; or the court may, to prevent error, give judgment for the sum. The verdict or judgment never can be for more than is declared for. And *Parsons v. Mc Masters* above. 10 Co. 116.

§ 3. So in Ejectment, if the jury find a verdict for all the lands sued for, the plt. may amend by releasing those not well described, the damages, and costs, and take judgment for those that are well described, and giving up damages &c. Cro. Car. 458.

§ 4. So trespass against three def'ts. who pleaded severally. Verdict as to the first, for the plt.; as to the second for the def't.; and as to the third, made no inquiry. Held, the plt. might release the third issue, and take judgment on the first. Rol. Abr. 796, *Brown v. Stephens & al.*

§ 5. So trespass against A and B. A pleaded, not guilty and B demurred; and the demurrer was decided for the plt. Held, he might have a writ of inquiry of damages, as to B, and release as to A, as the court could not allow damages against both severally. 2 Rol. Abr. 785, *Starr v. Cuckow.*

§ 6. So trespass against A, for assault and battery, and for taking the plt's. corn. A justified as to the battery; and pleaded not guilty as to the corn. Plt. demurred to the first, and joined issue on the second plea, and for him a verdict was found on the issue. Held, he might take judgment thereon, as to the corn, and relinquish the demurrer. 2 Rol. Abr. 785, *Washman v. Rowe.*

§ 7. *By consent.* By it a local action may be tried in another county, this consent of parties being entered on record. Rol. Abr. 785.

§ 8. If a man justify in trespass upon a prescription for common, for beasts *levant* and *couchant*, and does not aver that his beasts were *levant* and *couchant*, it shall be aided after verdict for him, who omits to aver the fact by the common law, because unless this fact had been proved to the jury, they could not have so found their verdict for him. See *Stennel v. Hogg*; and *Skinner v. Gunton*. The beasts being *levant* and *couchant*, though a material circumstance omitted in the plea, yet not a distinct independent fact, so implied in the verdict finding for the def't. on the prescription for common, the main fact or matter well stated. 1 Com. D. 458.—Cro. Jam. 44.—See ante.

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13 Mass. R.  
189, Parsons  
v. Plaisted &  
al

8 Co. 157,  
old edition,  
310 to 324.—  
Dublin Ed.  
1793, case of  
Blackmore.

§ 9. An action of covenant was brought against several defts., one a *feme covert* when the covenant was made, and therefore, she was improperly joined; but the court would not allow her name to be struck out, even after she was dead, but on payment of costs.

ART. 11. *Selections from Blackmore's case.*

§ 1. This case deserves particular attention in several respects; especially as scores of decisions stated in it, are handed down, as law, in most of our modern digests &c. whereas all these decisions nearly, were made on the very narrow and limited powers the courts had when they were made, in virtue of the common law, and the statutes of the 14 Ed. III, and 8 H. VI. only, and these powers exercised in a very restricted manner.

§ 2. In this case it appears that when Leventhorp Frank was a gentleman, (one of the defts.) he gave a bond by that addition; but before sued was made a knight, and the plt's. attorney, in a note to the cursitor, directed him to be sued thus: London. Leventhorp Franke *nuper de Hatfield in comitatu Essex, militi; alias dictus Leventhorp Frank de Hatfield Brodock in comitatu Essex generoso, quod reddat* (to the plts.) £100 *quas eis debet et unjute detinet*. In making out the original, Franke was styled *generoso*, (instead of *militi*) and in the *alias, dicto, generoso*. The entry of the *capias, alias*, and *pluries* were according to the original, *generoso* only; but in the *exigent* and proclamation, and entry thereof, he was named knight, and truly, and by this name he put in a *supersedeas*, and by it, the plt. declared against him; and he imparled, and next term suffered judgment by default, by the name of *knight*; and 8 Jam., a writ of error was brought; and on motion, the original was amended by the said attorney's direction or note, on his examination, and that of the cursitor on their oaths. This writ was purchased out of another court, the chancery.

§ 3. Held, an original writ was not amendable by the common law, in a common person's case, but otherwise in the king's case. Lord Coke stated several amendments at common law for the misprision of the court, before 14 Ed. III. the first statute of amendments as variance in any part of the record of the original. So the judges could amend judgments, or any part of the record &c. in the same term; as during it the record was in their breasts, and not in the roll. But the clerk's misprision in another term, in the process, was not amendable, as in that, the roll became the record.

§ 4. Then the 14 Ed. III. c. 6, enacted, the clerk's misprision in process should be amended (as cited above.)

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Coke observed, this act extended only to amend the clerk's mistake in process, but not to the original writ, or to one in its nature; because not within this word, *process*; but otherwise, as to judicial writs: gave the two meanings of the word *process*, in its large, and its restricted sense; and thought it used in the latter in this statute; but to be extended to amend words as well as letters and syllables, as also a title. Coke then stated, that the 8th H. VI. c. 12, was passed to remove many doubts, and to enlarge the court's powers to amend: and 1st, against falsifying of records: 2. Against the mistakes of clerks; and that by force of this act the amendment at bar was made: (see this act above:) noticed this act extended to process, and seven other matters; as to record, word, plea, warrant of attorney, to writ original and judicial, pannel, and, seventh, returns. He then minutely explained each; and said, that in forming each original writ, the party must furnish the facts, and the clerk draw them into form; so it may be bad by the misprision of the party or clerk; and that the 8th H. VI. only extends to amend the misprisions of the clerk, and not of the party; and it was the clerk's misprision not to follow the attorney's note or direction above: made a distinction between the clerk's oversight and negligence and his ignorance; and construed this act to authorize defects occasioned by his oversight and negligence, to be amended; and not those occasioned by his ignorance or nescience. This distinction seems to have led to a very nice and endless inquiry, what defects were occasioned by the one or the other.

§ 5. Lord Coke then observed, that those things which are amendable before the writ of error brought, are amendable after; and if the inferior courts do not amend writs &c. the superior courts may amend them. He then stated fourteen misprisions to which the 8th H. VI. c. 12, and 8th H. VI. c. 15, did not extend: 1. Not to want of an original: 2. Misprision of form therein: 3. Material variance between the original and count: 4. Insufficient trial: 5. Jurors returned not by the right officer: 6, 7, and 8. To certain defects in trials: 9. Not to a fault of the party, or his counsel, in pleading: 10. Nor to any error or misprision of the judge in any past term: 11. Nor to taking the verdict &c. at *nisi prius* &c.: 12. Nor to want of warrant of attorney: 13. Nor did 8 H. VI. and 32 H. VIII. c. 30, extend to aid any imperfections, or misprisions, where a verdict is given on an issue joined between the demandant and vouchee, or the tenant and vouchee: 14. Not to an appeal, or any pleas of the crown.

§ 6. Lord Coke also, in this case, stated, that all the mis-

CH. 184. prisions not remedied by 8 H. VI., remained not remedied  
 Art. 11. by any law or statute. (32 H. VIII. c. 30, and 18 El. c. 14)

“where no verdict is given upon issue joined;” as if judgment was given upon confession, demurrer, *nil dicit*, *non sum informatus*, or otherwise than by verdict. He added, when a verdict, on issue joined and tried, was given, ten misprisions were not remedied by 32 H. VIII., and 18 El. or any other statute, but did remain not amendable: 1. As the third above: 2. When the original or count wanted substance: 3. Insufficient trial: 4. Same as the fifth above: 5. When the sheriff did not sign the return of the jury: 6. When on the *venire facias* &c. no return was indorsed, though verdict passed: 7. When one appeared and was sworn, and joined in the verdict, and was not returned on the *venire facias* &c.: (These 5, 6, and 7, same nearly as 6, 7, and 8, above:) 8. Same as 14 above: 9. Though a verdict was for the plt., yet if, on the whole record, the court saw he had no cause of action, he could not have judgment by any statute: 10. Same as the 10 above.

Lord Coke also cited in this case, several decisions to support each position he laid down. Thereon examining this action, statutes of amendment and *jeofails*, to the 18 El. included, we find they gave the courts powers to allow amendments extremely limited. Whereas the said American statutes give them power to allow amendments on motion, in all proceedings in a course of justice, in matters of form, at least in civil causes; using the broadest expressions; and the Massachusetts statutes use no expressions or words to confine these powers to civil actions; and very able judges in England have often held, that statutes of amendments and *jeofails* extend to criminal prosecutions, when there are no words or expressions in them to confine them to civil suits.

§ 7. On a full view of the ancient English and these American statutes, it may be well affirmed that the former do not allow a fiftieth part of the amendments to be made, the latter do. In these latter statutes, the powers to amend are not restrained in *civil* causes and matters of *form* to any particular part or parts of the proceedings in suit; nor to the acts of any particular persons concerned in them, whether parties, attornies, counsel, clerks, officers, jurors, or judges, &c.; whereas these ancient English statutes give powers to amend by little and little, and most sparingly. The 14 Ed. III. gave power to amend only the *misprision* of the clerk only in *process*, construed to mean only his *oversight* or *negligence*, not his *ignorance*, and only in syllables, letters, and words. 11 H. IV., 9 H. V., and 4 H. VI. seem to have enlarged this power in nothing material. 8 H. VI. merely

extended to falsifications of the record, and to the very limited amendments above stated by Lord Coke; also, all the defects not remedied thereby, remained not remedied by 32 H. VIII. and 18 El., except in cases of a verdict found on issue joined; and as he stated when a verdict was so found, so misprisions remained not remedied by these two statutes; and *process* was construed to mean only *mesne* and *jury process*. So these ancient English statutes were confined to the courts above; but our American statutes extend to inferior as well as superior courts; nor did any of the English statutes of amendments &c. to the 4 and 5 of Anne included, extend to writs of error; hence the 5 Geo. I., c. 13. Yet the English statutes, and the numerous judicial constructions of them, may be useful to us, as they in numerous cases make the true distinctions between *substance* and *form*, and between the different parts of pleadings.

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This inquiry has been pursued thus far in order to come to this material question: How far can the ancient amendments to Coke's time included, allowed or refused, so copiously handed down to the present time, be any useful guide in allowing or disallowing amendments on our American statutes, which extend the powers of the courts to allow amendments in all cases in *proceedings in course of justice* at all times, with the exception of matters of *substance* and the exception of *criminal cases* in the United States courts, and as is usually understood in Massachusetts courts? It will be further observed, that the courts in practising on these ancient English acts were less attentive to the important distinction between *substance* and *form*, than our courts are now in practising on our modern acts of *amendments* and *jeofails*.

§ 8. On the whole, when it is considered that our legislature as early as 1641, passed an act of amendments and *jeofails* in very general terms; it may be a question if the English statutes of this kind were ever in force here on sound principles of law; and as the same statute of the United States which created the Federal courts, included the said provision as amendments &c. so very general, the inference is, they never have been in force in those courts; and in regard to this obscure branch of the law, it so happens, that there have not been decisions enough upon it printed, or to be found with any convenience in the United States, to throw any light of importance upon the subject, as will appear in the next article; and for a full and fair construction of these American statutes, we must wait for judicial decisions in the highest American courts, the only way possible to come to a right understanding of them; especially how far these acts can be construed to cure some defects in matters

CH. 184. viewed as *substance* by many judges, aided and cured by express words in some of the said English statutes, as the 4 and 5 Anne, 5 Geo. &c.

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ART. 12. *American cases of amendments &c.*

See art. 6, s. 10, 11, {a. 7, s. 8.

5 Mass. R. 379, Green v. Gill, exr.

§ 1. See statutes, article 4; also court rules; and adjudged cases, Haynes v. Morgan, article 4; Parsons v. M'Masters, article 6; Peabody v. Tyler, Holbrook v. Pratt, Walker v. Maxwell, Doyle v. Moulton, article 6; Wells v. Dench, Leighton v. Leighton, article 7; Sudbury v. Howe, this chapter; Pearson v. Little & al., Adams v. Hemmenway, Ch. 58, a. 3; Cummings v. Rowson Ch. 172, a. 6, s. 9; Stetson v. Toby, Ch. 148, a. 11.; Hamilton v. Borden, Ch. 148, a. 11. Plt. filed new counts, and held, that whenever the plt. amends his declaration, the deft. may replead of course, if the amendment varies the defence, or renders a new one necessary; but the rule does not extend to pleading double on the amendment. If the several pleas proposed be necessary to his defence, he may plead double and the act of limitations; and though in this case double pleadings does not appear to be necessary, yet if the deft. will waive his former plea, he may plead the act after this amendment.

7 Mass. R. 358, Barnard v. Whiting & al.

§ 2. *Assumpsit* and the declaration contained several counts; general issue pleaded to all, and verdict on all for the plt. at a prior term; motion by the deft. in arrest of judgment; because the fifth and last count was bad, as a *general indubitatus assumpsit* for money had received, must be for *cash*; but here it was for *bank bills* of the Penobscot Bank. The judge certified all the counts were for one and the same cause of action; and held, hereon he might have directed a verdict on the counts the evidence applied to; and though he did not do it, the plt. may now *amend his verdict* by taking it on either of his counts on this certificate, though it is not in the same term. Verdict amended so as to find on one count only, and judgment given on it so amended.

9 Mass. R. 96, Hearsey v. Bradbury. —See 2 Cro. 188.—Stra. 136.

§ 3. In this personal action the writ was directed to the sheriff or his deputy, and the *ad damnum* was under seventy dollars, and was served by a constable, though not directed to him. The court allowed the plt. to amend his writ by inserting a direction to the constable. At the return term, the deft. in the lower court moved it, *ex officio*, to abate the writ; but the plt. moving for leave to amend, that court granted it, and on the appeal this motion was renewed and allowed, as being only matter of *form*.

10 Mass. R. 203, Kincaid v. Howe, in error.

§ 4. In this case the plt., Samuel Kincaid, brought an action against Howe, on notes of the deft. payable to Kincaid *junior*; but the plt. did not sue by the name of *junior*, but had judgment before the justice of the peace on appeal to the

common pleas. In that court the plt. moved to amend by adding *junior*, his father, Samuel Kincaid, living in the same town; that refused; also refused to admit said notes in evidence; bill of exceptions filed, and thereon the court above held the judgment for the deft. below should be reversed, and a new trial granted; and that the amendment should have been allowed, as it was to conform the plt's. writ to his evidence; also without the amendment the court might well have admitted notes in evidence; that *junior* and *younger* is no part of the name, but an addition by use, and a convenient distinction when father and son are of the same christian and surname, or when two persons of the same names and occupations reside in the same town. And it seems to be only in the case of father and son of the same names, that the addition is required to be stated in the writ, where the son is deft. Any other words describing the deft. as the son, are equivalent; and if the description is omitted, and the right deft. appears and pleads, he cannot afterwards object for the uncertainty; and if the father appears, the plt. may aver he is not the person sued, but may shew by additional averments on the record, the son is the person sued, and on whom the writ was served. Where the omission respects the plt., it cannot be shewn in abatement where the variance is discoverable; but even then, and in the case of a deed, a variance in any addition or description of the person, is considered as immaterial, and not to be taken advantage of in pleading, and of course not in objecting to the deed as evidence.

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§ 5. In this case it was held, that the Supreme Judicial Court could not amend a record of the common pleas, brought before them by a writ of error; for the writ of error is a commission to this court to examine the record of the judgment below, and to reverse or affirm it according to law. This court can only examine that record as it is certified to it, and decide if it warrants the judgment or not. If any alteration or amendment be made in this court, it is no longer the same record, which alone this court has power to examine. An amendment had been allowed by a *nisi prius* judge.

10 Mass. R.  
251, Hutchin-  
son jun. v.  
Crossen.

§ 6. A declaration amended, increasing the *ad damnum*. So another was amended after a plea in abatement; but not by adding the name of a deft. against whom a separate action was brought for the same demand.

2 Johns. Cas.  
219, 336,  
Shute v. Da-  
vis & al.

§ 7. Verdict in ejectment amended by adding, "and for the residue they find for the deft." Held, the *jurata* and *dis-tringas* may be amended after verdict, and without costs.

1 Dall. 133.—  
1 Johns. Cas.  
220, Her-  
mance v. De-  
lamiter.—

3. *Writ of inquiry*. Held, a mistake in it of the formal

1 Johns. R.  
69, Richardson v. Backus.

69, Richardson

CH. 184. description of the court, to which returnable, is cured by the  
Art. 12. statute of *jeofails*.

At the trial of an action on a policy of insurance, there was a want of *preliminary proofs*; but no objection made, and the parties went to trial on the merits; allowed special verdict to be amended by adding these. 1 Johns. R. 149.

1 Johns. Cas.  
29, Hamilton  
v. Holcomb.

§ 9. On error *coram vobis*, the record was allowed to be amended by entering a suggestion of the death of one of the defts. pending the original action. Like case, 2 Johns. R. 184.

3 Johns. R.  
95, Tillotson  
v. Cheetham.  
—3 D & E.  
659, 749.—  
Salk. 270—2  
Lev. 22.—4  
Johns. R. 490.

§ 10. After an assignment of errors, and joinder in the court for the correction of errors on motion, the original record in matters of *form* was amended; for the original record remains in the Supreme Court, the transcript only being sent up with the writ of error. 2 Ld. Raym. 1570; 2 Stra. 869, done after argument on joinder in error.

2 Dallas,  
184, Fury v.  
Stone.

§ 11. After error brought, the court allowed the plt. to enter a *remittimus* of the damages found, so far as they exceeded the amount in the *ad damnum* in the declaration.

3 Johns. R.  
526, Close v.  
Gillespey.—  
1 Caines, 9.—  
1 Saund. 247.  
—4 Burr.  
2449.

§ 12. In this action a judgment was entered on a warrant of attorney, and was properly signed and docketed, but by the attorney's negligence, the deft's. plea was not signed by him, nor was the name of his attorney inserted in the record. The court allowed the plt. to amend the record, *nunc pro tunc*, by inserting that name, though an after judgment had been given against the deft., on which a preference was claimed. No difference between a clerk's and an attorney's omission.

3 Johns. R.  
141, Dumond  
v. Carpenter.

§ 13. It is too late, after assignment of errors, to move to amend the return of a writ of error. A void writ not amendable; 4 Johns. R. 304. So too late after judgment on demurrer in the next term to amend: 3 Johns. R. 140.

1 Johns. Cas.  
246, Holmes  
v. Lansing.

§ 14. The plt. cannot amend his declaration after plea pleaded, but on paying costs and giving a continuance; and Coleman, 92.

7 Johns. R.  
Pease v.  
Morgan, 468,  
470.—See 1  
Caines' R.  
192.—1 Wils.  
303.

§ 15. In error from the common pleas, the Supreme Court allowed the deft. in error, to amend his declaration, paying costs in the lower court, subsequent to the declaration, by averring the plts. in error were partners &c., and they were allowed twenty days after the service of such declaration, to pay the amount recovered below, without costs, or to plead; and if they pleaded, a *venire de novo* was ordered, returnable at the next circuit. Amendment was of a variance.

6 Cranch,  
206, 221.—  
M. Ins. Com.  
of Alexandria  
v. Hodgson.

§ 16. Held, in this case, that a refusal of an inferior court to allow a plea to be amended, or a new plea to be filed, or to grant a new trial, or to continue a cause, cannot be assigned as error; and that after a cause is remanded to it, it

may receive additional pleas, or to admit those already filed to be amended, even after the appellate court has decided such pleas to be bad, on demurrer. Ch. 184. Art. 12.

§ 17. The court allowed the case to be amended after argument of it, and before judgment, at the deft's. request, on paying costs of the argument, and giving the plt. the election afterwards to be nonsuited, or to have a new trial. 3 Johns. R. 140, Jackson v. Brownel.

§ 18. A declaration in *trover* was allowed to be amended after issue joined, by substituting *hyson skin* for *hyson* (tea.) 2 Johns. R. 295.

§ 19. After an action has been commenced several terms, and notice for trial several times, the court will not allow the plt. to amend his declaration. A bill is always allowed to be filed *nunc pro tunc*, on error brought, and that assigned for cause; Coleman, 55. Amendment allowed in a *qui tam* action. 2 Johns. R. 206, 207.—Dallas, 143.

§ 20. Bill in equity amended after the act of limitations pleaded, so as to allege the fraud charged, came to the plt's. knowledge within six years. 2 Dallas, 364, Wharton v. Lowry.

§ 21. Plt. amended on paying costs after judgment on demurrer, though he had before amended. Hallock v. Robinson, 2 Caines' R. 233, 270. 1 Caines' R. 19, 22.

§ 22. Writ amended by adding the clerk's name, on paying costs. Writ of *renditioni exponas* amended; Coleman, 55, 59, 69. A *feri facias* amended after returned satisfied, 66. Execution &c. amended, containing costs larger than those adjudged; 3 Caines' R. 98. Judgment for sixpence too little, amended after error brought, on payment of costs; Coleman, 41; another amendment after error brought. 61. Justice return amended after error assigned and judgment thereon; 2 Caines' R. 139. Amendment after error; 4 Dallas, 25. *Certiorari* amended; 1 Caines' R. 486. Plt. amended by adding a count on the demise of a new lessor; Coleman, 49, Wimple & al. v. McDougal. The *testatum* of a *ca. sa.* amended after the deft. was taken on it; 3 Johns. R. 144. 1 Johns. Ca. 31.—1 Caines' R. 251, 381.

## CHAPTER CLXXXV.

## PLEADINGS—AMENDMENTS.

*Judicial proceedings—amendments in particular parts thereof.* Though it may be a question how far the English statutes of *amendments* and *jeofails* have been adopted here, yet it is certain, that many English decisions thereon are very useful here in construing our statutes on these subjects, as to particular parts of “proceedings in a course of justice;” for instance *form* and *substance* are usually the same in English judicial proceedings as in our own. So *amendments at common law* are the same in both countries. So usually the distinctions between *surplusage* and *matters material* in the suit; between *inducement* and the *gist* of the action; between matters alleged under a *videlicet* or not &c. are the same in both; and generally wherever amendments may be considered as allowable; or faults may be considered as cured in virtue of the English acts of *amendments* and *jeofails*, giving such limited power in these respects, they may be considered allowable, or cured under our statutes giving such very general and enlarged powers.

ART. 1. *Declarations.*

§ 1. On this head many cases will be found in chapters prior to the last, and several in that, as *Bonfield v. Milner*; *Goff v. Popplewell*; *Steel v. Lowerby*; *Crosse v. Kage*; *Maddock v. Hammett*; *Sudbury v. Howe*; *Haynes v. Morgan*; *Holbrook v. Pratt*; *Garner v. Anderson*; *Leighton v. Leighton*: may be amended any time before the cause is committed to the jury, 3 Day’s Ca. 312, 496; not in a *quidam* barred by the act of limitations; 4 Day’s Ca. 37; after a plea in abatement, 2 Johns. Ca. 330.

§ 2. The title of a declaration may be amended, 1 Wils. 242, and 1 Wils. 78; but amendment of declaration after verdict refused, 2 Wils. 147; not amendable after two terms, 1 Wils. 149; allowed after the second term, but no new counts to be added, 7 D. & E. 698; amended in trespass as to the *quod cum*, on a right bill filed, 2 Strange, 1162, *Marshal v. Riggs*.

1 Ld. Raym.  
116, *Smith v.*  
*Fuller*.  
Stra. 1161,  
*Wilder v. Handy*.

§ 3. The declaration in trover was amended by inserting the name of one of several defts. after error assigned for that defect, all having pleaded; evidence having been given against  
—9 Johns. R. 78.

all; and all having been found guilty. Here was sufficient matter by which to amend at common law; too late to amend after judgment and the term ended. CH. 185. Art. 1.

§ 4. General rule after a declaration is in *parchment*, the court can amend no farther than is allowed by statutes of amendments; for it is then a record, and not amendable at common law. 1 Salk 47. —Stra. 1161.

§ 5. *Assumpsit* laid to the *testator*, amended so as to be laid to the *executors* after issue joined. Was this in matters of substance or form? 2 Stra 890, Duke of Marlborough v. Widmore.

§ 6. The declaration was amended by entitling it on the day on which it was actually delivered, instead of the term generally; order to make it agree with an averment in it, that other defts. named in the writ were outlawed; and Ld. Raym. 977. So to a particular day on which the plt's. bill is filed, and after error brought. 1 East, 133, Coutanche v. Le Ruez.—7 D & E. 474.

§ 7. If the count have the *substance*, it is sufficient, though it be defective in *form*; this may be amended, 1 Co. 161, a. And trespass *quare clausum fregit* against the deft. as *administrator*, amended to *executor*, after plea, on costs; Barnes, 5. 1 Com. D. 448, Blackmore's case.

Declaration in trespass running by recital, may be amended on motion in arrest of judgment, by the bill if right, and the court will not inquire when it was filed, or give leave to file one by which to amend; and the amendment may be after special demurrer and argument. By this rule a recital, as *quod cum* &c. may be amended. Stra. 1151, Wilder v. Handy.—Stra. 683.—Stra. 954.

§ 8. If a declaration in ejectment be filed with blanks for the quantities of land &c., but a right declaration is delivered, and also the plea and *nisi prius* rolls are right, it shall be amended; for the deft. was not deceived, the declaration delivered being right, and it was the clerk's fault that he did not make the declaration filed perfect when he had instructions to do it. 1 Com. D. 449.—1 Rol. 207.

§ 9. A declaration in *assumpsit* may be amended after plea pleaded, by striking out £300 and inserting £8000. 2 Wils. 7, Havers v. Bannister.

§ 10. But it is said in this case, that the plt's. demand cannot be amended after verdict, judgment, and error brought, however manifest the *misprision* may be; see above. Andr. 351, Ray v. Lister.

§ 11. Declaration v. *James B.* reciting writ against *John B.*, amended by rejecting the word *John*. So by striking out *prochein ami*, the plt. having attained his full age. And declarations on bail bonds, are amendable as any other declarations are. Barnes, 11, and 18, 27, 114.

§ 12. In all parts of pleading, if the gist of the case be put in issue and found, all collateral circumstances will be intended after verdict; because in all proceedings in a course of justice, *substance* is the essential, the material thing, to be

CH. 185. attended to, and when the *substance or gist* of the case is once  
 Art. 2. tried, the court will not readily put the country and parties to the expense and trouble of another trial.

ART. 2. *Pleas, replications, &c.*

1 Com. D. § 1. Amendment of pleas &c. see Walker v. Maxwell;  
 451, Amend- Doyle v. Moulton. If a plea, replication, &c. be defective in  
 ments M. form, it may be amended; as if it contain *surplusage*; as where the plt. in the declaration alleges a trespass *ultimo die J.*, 1 Jam., and in the replication says, *quod transgress. predicto ultimo die J.*, 5 Jam. for 1 Jam., it shall be amended; for *predicto ultimo die J.* was sufficient, and the addition of the year was *surplusage*.

Cro. Jam. 13, § 2. Error on a judgment in *audita querela*, in C. B. on a  
 Phillips v. statute of £3000, and the deft. suggested there was a defeas-  
 Hugre. ance, if he paid £50 yearly, for six years, to one John Bush, at —, on —, it was to be void, and averred the statute was made to the use of the said John Bush, and that he tendered said £50 at —, on —, and said John Bush was not there to demand or receive it. Deft. protested the plt. did not tender &c. For plea, the same John Bush said, that he was there to receive &c., and none there to pay &c. It was objected, that for plea, John Bush, a stranger, said; where it should be, the same Rice Hugre said. Held, not amendable, as it was of the *substance* of the the plea, and so no plea. So error in *substance* for the *cestui qui trust*, to plead and say, where the trustee should do this.

Cro. El. 782, § 3. Assault and battery. Plea, *son assault* &c.; replica-  
 John Coston tion, the deft. beat the plt. *de son tort demesne sans tiel cause*  
 v. Thomas per ipsum John Coston, above alleged; and issue, and found  
 Coston. for the plt.; and in arrest of judgment it was said, the replication was bad in *substance*, so not aided by any statute; and no issue found, for the plt. traversed matter alleged by John Coston, whereas it is alleged by Thomas Coston. But held, it was only a *misprision*, and amendable. And this case is an authority in the many cases in which, in joining issue or pleading, the name of one party is mistaken for that of the other. And in this case a like mistake was amended after this was the error assigned on error brought. A like mistake amended after verdict; Cro. El. 904, Russel & al. v. Grange.

Str. 686, § 4. To a *scire facias* on the crown side, on a recognizance  
 Rex v. Betts to keep the peace, the deft. as to the breach assigned, plead-  
 & al. ed not guilty, and concluded *hoc paratus*, instead of *to the country*. Demurrer on motion amended. This case is a rule for other cases thus misconcluded.

1 Wils. 76, § 5. Assault and battery. Plea, *son assault demesne*, and  
 Low v. New- the plt. replied, *de injuria sua propria*; and afterwards moved  
 land.

to amend his replication by replying *molitur manus imposuit*; amendment allowed, the pleadings being all in paper, and not entered on record. Here by amendment, one replication was substituted for another; and these pleas are materially different. Ch. 185.  
Art. 2.

§ 6. The plt. by his former attorney's mistake, traversed a lease under which he claimed, in his replication. Allowed to amend by withdrawing it, and to reply *de novo*, even after six terms. And Lord Mansfield said, the court had not used so much strictness in allowing amendments of late years, as they formerly did. So if there be no *similiter* in the replication to join the issue after verdict and a motion in arrest of judgment, the issue may be amended and completed by adding the *similiter*. 2 Barr. 755,  
Alder v. Chip.  
  
Cowper, 407,  
Sayre v.  
Poeock.

§ 7. Debt on a *replevin* bond. Plea, A (the party *replevying*) did prosecute his suit to effect, and that no return of the goods were adjudged to B. Plt. replied, a return was adjudged to B, but said B did not make return, and concluded his replication with, *and this he is ready to certify*. Held: 1. *Certify* should be taken to mean *verify*; and that even no verification was necessary, it being in the negative: 2. That the mistake of the name of B for A was fatal, and bad on general demurrer; so matter of *substance*, and not the *misprision* of a word only. Yet did not matter appear in this case, on which the court could have given judgment according to the very right of the cause within 4 and 5 Anne? Willes, 5,  
Harvey v.  
Stokes.

Thomas, executor of Nicholas Joyce, brought *assumpsit* against said Willoughby; for he promised the *testator*, in consideration he would, on request, deliver £40 to him, said Willoughby, to repay it on —; and the declaration was, that said Nicholas said in fact, that he, said Nicholas, delivered to him the £40, and the deft. had not paid it &c. *Non assumpsit*, and verdict for the plt., and motion in arrest of judgment; for the declaration was insensible, "*quod idem Nicholaus decit in facto*,"—because he is a dead person; motion to amend refused, for it is the very *substance* of the declaration, and no precedent matter to induce to it." Cro. Jam.  
587, Thomas  
v. Willough-  
by.

If the deft. pleads *two* pleas, and issue is joined on *one*, and verdict for the plt.; the deft. not allowed to amend the other. 1 Com. D.  
453.—Barnes,  
25.

§ 8. It is a settled rule, that as every declaration must contain all essentials necessary to maintain the action, so the deft's. bar must contain all essential matters necessary to main his defence; and as the plt's. declaration must not be invalidated by his replication; so that the deft's. bar must not be invalidated by his rejoinder &c.; for every after part of a party's pleading repugnant to a former part of his pleading, makes void such former part; as if the plt. declares on a Saund. 116.  
226, Cutler v.  
Southern.

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bond made the 10th of March, and replies the bond was delivered the 30th of March, this falsifies his declaration. So if the rejoinder falsifies the bar, the bar is vicious, and made void; and see departure; and also Ch. 178, arts. 3 and 4; Cro. Jam. 204.

6 Co. 43,  
Nichol's  
case.  
Cro. Jam.  
177.

§ 9. A bar bad in *substance*, found for the deft., he cannot have judgment, but found for he plt. he will have judgment; otherwise, if bad in *form*. As in debt on a *single bill*, plea payment, but without acquittance, and found for the deft., he cannot have judgment, as the gist of the plea is bad, since the bond is in force till dissolved *eo ligamine quo ligatur*; and the acquittance under the plt's. seal is the gist of the bar; but if in such case found for the plt., he has judgment, because the bar is bad in *substance*, also found false; but if bad only in *form*, and found for deft., the verdict cures the defect in *form*. As in debt on bond conditioned to pay £10 May 15; plea, paid May 10, and found he paid May 10, deft. has judgment; though this bar is bad in *form*, it is not according to the condition, and the plt. might well have demurred specially; yet as the verdict has found payment before the day, that in law is payment at the day, and the substance is found.

ART. 3. *Record and judgment, how amendable or not.* See Smith v. Fuller.

2 W. Bl. 920,  
Parker v.  
Ansell.

§ 1. After a new trial is granted no amendment will be allowed in the record; but our practice is sometimes to allow a new trial, in order the court may authorize an amendment by consent of parties, and the entry is so made, though in no such consent. See Salem v. Andover.

3 Salk. 34.—  
New R. 28,  
Grundy v.  
Mill.

§ 2. A record shall not be amended by a draught below. If to a rejoinder concluding with a verification, the plt. add the *similiter*, and take the record down to trial, and verdict for the deft., the court will amend the record, and not grant a new trial.

7 D. & E. 474,  
Dickinson v.  
Plaisted.

§ 3. Leave to amend a record, by inserting a minute of the day of the plt's. bill filed after error brought; but no alteration can be made without leave of the court; not even by consent of parties.

2 Ld. Raym.  
895.—1 Bac.  
105.

§ 4. The record of a judgment may be amended by the judgment paper; as judgment may be amended by another part of the record.

1 Wils. 61,  
Sale v.  
Crompton.

§ 5. The deft's. name in a judgment, on a warrant of attorney, not amendable if wrongly inserted. This warrant had been given twelve years before, and omitted the *r*, and it was made Compton. The refusal to amend was for fear of inconveniences to purchasers.

§ 6. The deft. in replevin, made cognizance for rent in arrear, and the jury found a verdict for him, and damages to the amount of the rent claimed in the cognizance; but found no amount of rent in arrear, or the value of the cattle distrained. Judgment was entered for the damages assessed. The court allowed the deft. to amend his judgment, and to enter a judgment *pro retorno habendo*, after a writ of error brought. It was objected that this amendment was a new judgment; but the court said it was the mere consequence of the jury's finding. In the next case the amendment was wholly on evidence *dehors* the record. As in this, an executor pleaded a former judgment recovered, and by mistake a less sum was stated than the judgment was really for; and held, if it clearly appear that a greater sum was recovered, the court will allow the deft. to amend the record, by inserting the real sum in the plea, though application be made for the amendment near three years &c. after the record is made up; but in such case will allow the plt. to reply, by fraud, though objected the record was regular on the face of it.

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3 D. & E. 349,  
Rees v. Morgan in error.

1 H. Bl. 238,  
Shutt v. Woodward.

§ 7. After a considerable length of time after trial, the court refused to amend the *postea*, by increasing the damages given by the jury, though all the jurymen joined in an affidavit, stating their intention to have been to give the plt. such increased sum, and that they conceived the verdict they had given was calculated to give such damages.

2 D. & E. 282,  
Jackson v. Williamson.

§ 8. Before the 4 and 5 of Anne c. 16, if in the judgment one party was misnamed, when he was rightly named in the record, judgment was amended by the record as the clerk's misprision. So if the judgment be entered upon a demurrer, as upon a nonsuit, it may be amended: so if the sum total of damages and costs be miscast: so if a judgment on a verdict be entered different from the *postea*: so if the judgment in ejectment omit *quod recuperit* &c.: so if *eat inde sine die* be omitted: so if the judgment be, that he recover for his damages and costs, where it should be for debt: so if the whole judgment was omitted.

Cro. Car. 594.  
—1 Bac. 115.  
—Cro. E.  
400, 864.

1 Com. D.  
459.—2  
Saund. 289.

§ 9. In trespass against three, if two plead, and one lets judgment go by default, and the jury find 35s. for the judgment, and on writ of inquiry 2s. is given against the other, the plt. may take judgment *de melioribus damnis*, or may enter a *remittitur*; but if judgment be entered, that the plt. recover 35s. against two, and 2s. against the third, this makes the judgment bad in point of law.

1 Wils. 30, Sabin v. Long.

§ 10. To a replication the deft. demurred, and judgment amended after error, by adding the words introductory to awarded inquiry; viz. that the plt. ought to recover his damages against the deft. But a judgment cannot be amend-

Str. 1182,  
Hillersdon v. Sheldroy.—  
Ld. Ray. 68.

CH. 185. ed by filling up a blank for costs and damages, as there is  
 Art. 4. nothing to amend by.

§ 11. After final judgment and writ of error brought, the  
 3 D. & E. 749, *postea* amended by the judge's notes of the *nisi prius*, after  
 Doe v. Perkins. the term, yet these notes were no part of the record.

§ 12. Action by original on bill of exchange against A  
 1 Wils. 86, and B jointly: A appears: B is outlawed. This, the plt.  
 Symonds v. shews in his declaration. A pleads, no such record of out-  
 Farmer. lawry. Plt. replies, there is such a record. If there be a  
 mistake in it, it may be amended on motion, and the deft.  
 plead *de novo*.

§ 13. It is a general rule, that the court will make no  
 amendment to defeat a judgment; the statutes allowing  
 amendments in affirmance of judgment only: so is the mean-  
 ing of our statutes.

Hob. 127, § 14. Judgment against husband and wife, and the judg-  
 Scalse v. Nelson. ment is, she is in *misericordia*, and not he, is amendable by  
 the paper book, that being right, after error brought. Both  
 should have been amerced. The action was for *her* defama-  
 tion.

2 Jones, 199. § 15. So two bring ejectment, judgment is entered, that the  
 Rol. Abr. 205 plts. *recuperit*, amended as a plain mistake of the clerk: so  
 if he mistake the damages *de incremento*, the court will amend  
 by the judgment book, that being a sufficient instruction: so  
 if the sum total in a declaration be miscast. 1 Bac. 105.  
 And generally whenever the clerk does not go according to  
 his instruction, or according to the record before him, his  
 misprision may be amended.

3 Mod. 112. Judgment on demurrer; and writ of inquiry issued on the  
 roll; but the words, "by the oath of twelve good and legal  
 men" omitted, amended.

Salk. 50, § 16. So a judgment misdated by the clerk, amended by  
 Parsons v. the paper book, signed by the master, as this was authentic  
 Gill. enough to amend by; but Cro. El. 497. Error not amend-  
 ed, because nothing to amend by; and it could not be ascer-  
 tained whether a mistake of the clerk or of the court in  
 giving judgment.

Cramer v. § 17. Execution amended returnable out of term. *Aliter*,  
 Van Alstyne. as to mesne process. 9 Johns. R. 380.

ART. 4. *Jury process and issue.*

Andr. 248.— § 1. *Distringas* amended. See Bullock v. Parsons. The  
 Barnes, 5. want of a return is cured by the appearance of, and trial by  
 a proper jury. A return of a *hab. corp. jurat*, may be amend-  
 ed after trial. Return of *venire* is amendable. Barnes, 11.

Stran. 684, § 2. *Case on two promises.* Judgment for the plt. on the  
 Hughes v. first; and on the second, *nolle prosequi*. Writ of inquiry of  
 Alvary. damages taken out, plt. had sustained by occasion of the

premises ; and on the return of it, amended, so as to make it by occasion of the non-performance of the said first promise, on the authority of *Baker v. Cambell*, where the writ was amended, the record of the judgment by default, being a warrant to amend by. CH. 185.  
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§ 3. So the clerk's misentry of this writ of inquiry amended ; as where he omitted *per sacramentum proborum et legalium hominum duodecim*, was issued after demurrer. 3 Mod. 112.

§ 4. Three defts., and the writ of inquiry recited two only, against which, it was allowed to be amended on motion, without paying costs. So if the day of the return differ from the day thereof awarded ; *Cro. El. 761*, it may be amended, by making the return conformable to the award thereof on the roll ; here was something to amend by : so if returnable after the term, if executed within it, and the award on the roll is right, is amendable : so a defective award of it is amendable by the writ itself, if right : so if none be awarded on the roll, it is aided ; but not if the award on the roll and the writ itself, are both mistaken ; nor can it be amended. 1 Com. D.  
461, *Condens*  
*v. Coulter*.—  
*Ridney v.*  
*Poole, Andr.*  
362.—1 Com.  
D. 461.—  
*Carth. 76.*

§ 5. Issue amendable ; as if it be plt. likewise, where it should be deft. ; and *e contra*. 2 *Cro. 587* ; *Skin. 591* ; *Stra. 551*, *Rawbon v. Hickman*. So by inserting the king's name. *Barnes, 18*. So if the deft. as to *vi et armis*, says, he is guilty, where intended not guilty, it is amendable. 1 *Rol. 200*. Plea, paid June 14, 11 *Jam.* ; reply, did not pay said 14th of August ; this mistake in the month amendable : so not guilty, amendable to *non assumpsit*. *Cro. El. 470* : so *nil debet to nil detinet* : so issue joined on a void plea, aided after verdict. *Cro. El. 250, 455*. As if one plead a grant of rent, without attornment, and issue is on the grant, and found for the deft. : so as to a surrender. 1 Com. D.  
454, *Amend.*  
O.  
See Ch. 91.  
2 *Cro. 550.*

§ 6. So if one plead a devise without the executor's assent, and issue on the devise, that is found, this defect is aided. *Guerney v. Clerk* : so accord pleaded without satisfaction. *Id.* : so acceptance or payment on a bond without deed, and the issue thereon is found for the plt., is aided, as in debt on bond conditioned to deliver fifty quarters of wheat. Plea, delivered thirty quarters pending the suit, which the plt. had accepted, but shew no deed. On this issue was taken, that he had not accepted &c., and found for the plt. Objected, it was no plea, so no issue. Held, it was aided. Yet omission of satisfaction in accord, is substance. 6 *Cro. El. 259.*  
—*Cro. El.*  
778 —*Cro.*  
*El. 260, Andrews v.*  
*Kirke.*

§ 7. A verdict cannot aid an immaterial, but will an immaterial issue ; but aids one decisive between the parties, though not so apt. *Cro. Jam. 44, 435*. 1 *Bac. 103,*  
104.

Prescription badly pleaded in the plt.'s plea in replevin, *Cro. El. 245, Austye v.*

*Fawkner*.—*Hob. 113*.—1 *Com. D. 466.*

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pleading the occupiers were bound to repair the fences, and found for the avowant; aided, though a bad plea, as occupiers include tenants at will, at sufferance, disseizors &c. not bound. Should have been pleaded, they and those whose estate &c.: so if a plea be double, and issue joined on both parts.

2 Cro. 86,  
Blunden v.  
Wood.

§ 8. *Debt on bond.* Plea by the deft., he delivered it to the plt. as an escrow, to be his deed on a condition performed, which was not performed, so not his deed. Plt. replied, delivered absolutely as his deed, and not as an escrow, nor on any condition. Issue thereon, and verdict for the plt., and judgment. Error brought and assigned; for that there was no plea or issue; so judgment should have been on the confession. Judgment affirmed.

2 Cro. 576.

§ 9. So an issue is aided on a negative pregnant, or without express negative or affirmative. Dan. 354.

5 Mod. 225,  
Jones v. Bodenham.

§ 10. *Curia.* "When an issue is joined on an ill plea, and a verdict for the plt., yet he shall have judgment; for the deft. shall not take advantage, after verdict, of his ill pleading." As if lessee for years plead, he is disseized by the plt., and issue thereon, and found for the plt., he has judgment; but if found for the deft. he cannot have judgment; for a lessee for years cannot be disseized.

2 Cro. 44.—  
Cro. El. 778,  
Dighton v.  
Bartholomew.

§ 11. So aided if issue be joined on an immaterial point or traverse. Though accord without satisfaction is an ill plea, yet issue thereon, and found for the plt., is well, though bad on demurrer; for it is not merely void, but only insufficiently pleaded. Nor shall the deft. in such case, take advantage of his own ill plea, after verdict against him; and is like the case of a plea of payment of a debt on a bond without acquittance itself, no colour of a plea; for though issue joined thereon is misjoined, yet it is a proper issue in the action; and the court said, "when a proper issue is joined in an action, though it be on an ill plea, and is found by verdict," it is aided; but an issue on a plea merely void and nugatory, is not aided; as in debt or *assumpsit*, and plea, not guilty, and issue on it. So a plea, *de injuria sua propria*, without saying, *absque tali causa*: so if no issue at all is joined: or an issue totally misjoined. Cro. Car. 94. Nor if the issue be between the demandant and vouchee. Dan. 352. Nor if judgment be not on the verdict. Id. Nor if the issue be on *nul tiel record*. 11 Co. 8, a.; 2 Cro. 304.

1 Com. D.  
455.

§ 12. Debt on bond for £10 10s.; plea, paid said £10, and issue thereon, and found for the plt., not aided. Repleader awarded. Here the issue was misjoined in the very point of the action; and therefore, the very point in the action could not be tried.

Hob. 113,  
Kent v. Hall.

§ 13. A fault in the bar is not amendable, if shewn for cause of demurrer. The bar mistated the party's name; but had it not been assigned for cause of demurrer, it could have been amended. Yelv. 38, Hughes v. Phillips; Yelv. 65.

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ART. 5. *Land actions, how amended or not.*

§ 1. The term in ejectment near expiring, was amended without any consent from five years to ten.

2 Stra. 1272,  
Oates v. Shepherd.

§ 2. But a demise in ejectment laid 1697 for 1696, not amendable after verdict, because it would be another title; though 1697 had not come.

1 Salk. 43.

§ 3. This was ejectment against seven defts., and all joined in the common rule, and the issue was right in the plea roll &c.; but the *nisi prius* roll was against five only; and after verdict for the plt., this was amended by adding the other two defts. And see Mullet v. Denny. Parish in a recovery, amended. 1 Ld. Raym. 134.

1 Salk. 43,  
Worcester,  
bishop of,  
his case.

§ 4. *Formedon.* Motion to discontinue on paying costs, there being a mistake in stating the estate tail in the writ. Plt. had sued the deft. in ejectment for the same lands. Plt. allowed to amend all the proceedings in the *formedon*, on paying costs in both suits; and a rule was made by consent. Same case, 2 W. Bl. 758, stated somewhat differently.

3 Wils. 206,  
Scott v.  
Perry.

§ 5. *Recovery.* The court will not allow a recovery to be amended on affidavit only; but it must appear on the face of the deed to lead the uses, that there is sufficient grounds for the amendment. The amendment as to the description of the premises was allowed, as the deed to lead the uses authorized it &c.

1 H. Bl. 73,  
Pearson v.  
Pearson.

§ 6. So the court gave leave to amend by the deed to lead the uses, a mistake in the writ of entry in a recovery. This was an amendment of the description of the premises. *Sundry cases cited.*

1 Bos. & P.  
137, Cross v.  
Gray.

§ 7. The court allowed an amendment in a common recovery, by inserting a new parish in the writ of entry, on an affidavit of the original intent of the parties, to include all their property within the county, and of the assent of all persons interested at the time of the amendment. The deed to lead the uses included the lands in both parishes A and B; but the writ only those in A, amended, to include those in B. The recovery was suffered. 25 Geo. III. Amendment; 31 Geo. III.

2 Bos. & P.  
560, Wheeler  
v. Hill and  
vouchee.—  
And Com.  
336.

§ 8. This writ of entry and subsequent proceedings in a recovery, amended by inserting the words, "all and all manner of tithes whatsoever, yearly arising &c. from and out of the said premises," on affidavit stating the vouchee's title to the tithes, and his intention to have passed all his interest in the premises; the word "hereditaments" being contained

2 Bos. & P.  
578, Dowse  
v. Lloyd and  
vouchee.

CH. 185. in the deed to lead the uses: done on the motion of the  
 Art. 6. vouchee: was suffered two years before.

2 Bos. & P. 680, *Milbank v. Jolliffe*.  
 § 9. June 23, 1772, a recovery suffered 2d October, 11 Geo. 1. of certain premises, was amended, by inserting in the writ of entry, and the subsequent proceedings, a certain advowson &c., &c., the word "hereditaments," being contained in the deed to lead the uses, and the intention to pass the advowson with the rest of the premises appearing, though the amendment was contested.

§ 10. A fine may be amended in form after error brought. Barnes, 216. So by the deed of uses, by adding a vill, though forty years afterwards. Barnes, 24; 3 Wils. 58; Ld. Raym. 209; Ld. Raym. 134.

3 Wils. 154, *Henzel v. Lodge*.  
 § 11. A common recovery amended on the affidavit of the vouchee, by adding a parish not named in the recovery, nor in the deed to lead the uses.

Willes, 563, *Wyman v. Thomas*.  
*General rule.* The court will amend a recovery whenever it can be done by the rules of law.

Willes, 563.  
 § 12. But the court cannot amend the teste of a writ of entry, where it is not the misprision of the clerk, and where there is nothing to amend by.

§ 13. *Writ of right.*

3 Bos. & P. 463, *Dumaday v. Hughes & al.*  
 —And New. R. 66.  
 Held, that in the court in a writ of right, it is not sufficient to state that the land descended to four women, as neices and co-heirs of J. S., without shewing how they were neices. Held also, the court ought not to allow the count in a writ of right to be amended, unless a favourable case be made out by affidavit; and the court thought that writs of right ought not to be encouraged.

1 New. R. 233, *Baylis v. Manning*.  
 Also 1 N. R. 64, *Charlewood v. Morgan*.—Hob. 249.  
 § 14. The court would not allow a demandant in a writ of right, to amend his count, by introducing an additional step in the descent, though it was sworn the mistake had arisen from the demandant's having been misinformed in the country; and that he would be barred if the amendment were not allowed. The original writ of ejectment was amended after verdict, by making *devisit*, *demisit*.

ART. 6. *Criminal cases.*

§ 1. It has been seen already, that amendments at common law extended as well to criminal cases as to civil; and many instances have been already given to this purpose; it therefore remains here only to add several cases to shew where amendments in criminal cases can be allowed or not.

4 East, 174, *Rex v. Darley*.  
 § 2. After verdict of guilty, the return to the writ of *certiorari* issued at the deft's. request, was amended by inserting in the return of the caption, the true time when, and the names of the justices before whom the Quarter Sessions was holden, at which the indictment was found &c., &c.

§ 3. So a return to such a writ so issued, was amended by inserting in it the commission of *oyer and terminer*, by virtue of which the court was holden, the names of the justices by whom holden, at which the indictment was found; and this on the production of the said commission, and the minutes taken by the clerk in court; also, the caption of the indictment was amended, by inserting the grand jurors' names.

CH. 185.  
Art. 7.

4 East, 176,  
n. Rex v.  
Atkinson.

§ 4. Not necessary to insert the names of the grand jurors by whom the indictment is found.

4 East, 176,  
n. Rex v.  
Aylett.  
Salk. 47,  
Rex v.  
Knolles.

§ 5. *Indictment for murder.* Deft. pleaded, he was Earl of Banbury &c. Attorney general replied &c. Deft. on motion, had leave to amend his plea, because the pleading was not perfected or entered on the record; and there having been several amendments in criminal cases; as 2 Cro. 529; 2 Rol. R. 59; Sid. 225, 243; Cro. Car. 144. The plea was filed, but not entered on the roll; and the court held, that before judgment, while matters were in *feri*, and in agitation, they had a power over all proceeding. See *Rex v. Harris*; *Rex v. Keat & al.*; *Rex v. Wolcut & al.*

§ 6. The deft. was indicted for forging a bond. A special verdict found a variance in the obligor's name; being *Peroch* for *Paroch*. The record of the indictment was right. *Nisi prius* roll amended by it, at common law.

Stra. 848,  
Rex v. Hayes,  
ante.

§ 7. For ages it seems to have been a question in England, if any of their statutes of amendments and *jeofails* extended to criminal cases, and the question is now not entirely settled. It is curious to observe the origin and progress of the confinement of these numerous acts to civil causes, and to informations &c. in the nature of civil causes. The first of these acts 14 E. III. c. 6, speaks of the party, in which expression it was thought the king could not be included, and this being the first act, and thus confined to party cases, was deemed the platform of all the others, though several of them contained no words or expressions whatever thus to confine them. In fact, this expression, *the party*, in 14 E. III. on which so much stress seems to have been laid, was not used alone; but this statute speaking of omission, defects, &c. added, "the same shall be amended as soon as perceived, by challenge of the party, or otherwise." In construing this statute the courts seems to have disregarded the spirit of it, also the words, or *otherwise*. If this and the other statutes excluded all criminal cases, why were many of them excluded by express words inserted in a number of these statutes.

ART. 7. *Informations how amendable or not.* See *Rex v. Wilks*.

§ 1 This was an information in the nature of a *quo war-*

Stra. 976, Rex  
v. Ellame.

CH. 185. *ranto* against the deft., who claimed to be mayor of Chester.  
 Art. 8. The deft. justified under a charter and by-law, by which the

mayor is chosen by all the fellow citizens of the city, and of the suburbs and hamlets, inhabiting within the same, or a major part of them; and laid his election to be, by the majority of the citizens of Chester. To this there was a demurrer, and joinder &c. Allowed to amend, to add, citizens who inhabited within the suburbs and hamlets: 1st, Otherwise the office would be lost without a trial: 2. No trick to gain time: 3. No trial lost: 4. The prosecutor was not driven to demur.

2 Stra. 871,  
 Rex v.  
 Charles-  
 worth.

§ 2. Information for forging a warrant of attorney to confess satisfaction of a judgment of Easter term. After issue joined, the record appeared to be of Hilary term. Information was amended without costs, the prosecutor having been admitted a pauper.

1 Stra. 185.

§ 3. The court said, an information exhibited by rule of court, was amendable. And Salk. 50: information amendable.

2 Stra. 911,  
 Rex v. Clendon.

§ 4. And information was laid for an assault in Middlesex, and the court refused to amend it, by laying it in London.

4 D. & E.  
 457, Rex v.  
 Holland.

§ 5. An information filed by the attorney-general against an East India delinquent, on two British statutes, to which he demurs; may be amended in B. R. upon the motion of the attorney-general.

4 D. & E.  
 548.

§ 6. Amendments upon informations have become a matter of course; that is, in informations in the nature of civil actions, brought to try and settle a mere civil right, or to do that justice to a party, that may often be done by a civil action; but not when the information is in fact and reality a criminal proceeding, the object of which is to punish some crime or offence; or is really in the place of an indictment.

ART. 8. *Sundry matters.*

4 D. & E.  
 486, Rex v.  
 Mayor & al.  
 of Stafford.

§ 1. *Mandamus.* The court will not amend a *mandamus* after a return has been made to it. A *mandamus* was granted to the defts. to admit a freeman; their return to it was traversed; plt. delayed to go to trial; and the court refused to allow an amendment, and said, the parties might apply for another trial. Ante, Ch. 184, a. 7, Rex v. Lyme.

3 Johns. R.  
 565.

It is contrary to all good practice to allow objections to mere form after issue is joined on the merits, so to amend &c.

§ 2. *Return of process &c.* It is substance that every writ &c. be returned by the proper officer; and if not, the return is void, and not amendable; as if by a sheriff in a case in which the coroner is the legal officer &c. But it appears according to Hearsay v. Bradbury, Ch. 184, a. 12, if the

proper officer serve a writ, his name may afterwards be inserted in it by way of amendment, though not directed to him.

CH. 183.  
Art. 8.

If the sheriff make no return to a *scire fieri* inquiry against an executor upon a *devastavit* suggested, it shall not be amended. Officer not allowed to amend his return after six years having been refused below.

1 Salk. 363.—  
13 Mass. R.  
270.

§ 3. *Mistake of a name.* If a name be once rightly named or inserted, it may afterwards be amended if mistaken, by the true naming, wherever the name mistaken can be discovered to be the same; as if the deft. be rightly named in the writ and declaration, and by the plt. misnamed in the appearance entered; this entry shall be amended; but otherwise if the *misprision* be where he is first named, as then there is no previous naming to amend by. The plts. name being Walter, one of the *assumpsits* was laid, the aforesaid William; there being no William mentioned in the record before. Held well, Stra. 228; see before several cases; 3 Wils. 49. The plt's. attorney made affidavit the writ was served on the deft. by his right name. Held a mere slip.

3 Wils. 49,  
Whiston v.  
Parkman.

1 Rol. 199.

§ 4. *Capias.* *Capias sa.* may be amended after it has been executed, by making its return before *our justices* instead of before *us*. May be amended; 5 Johns. R. 163; 2 Burr. 1187. But Coleman's cases, 85.

2 W. Bl. 830,  
Hunt v. Ken-  
drick.

So a *capias ad respondendum* amended, not being fifteen days between the *teste* and return. 3 Wils. 454, Corty v. Ashley; so 1 H. Bl. 291, Boucheir v. Wittle; 1 Bos. & P. 342, Davis & al. v. Owen.

A. B. was arrested on a *capias* sued out against him by the name of C. B. A bail bond was given, by which A. B. arrested by the name of C. B., became bound in a bond conditioned for the appearance of A. B. arrested by the name of C. B., the affidavit to hold to bail, named this deft. properly A. B. The court amended the *capias* and the return, (but without prejudice to the sheriff), and rejected an application by the bail to cancel the bail bond.

2 Bos. & P.  
109, Steven-  
son v. Dan-  
vers.

§ 5. *Teste of the writ.* If the award of the writ of inquisition on the roll, be right, the *teste* of the writ, if wrong, shall be amended by it. Authorities for amending the *testes* of writs, Cro. Jam. 64, 162, 442; Cro. El. 183, 203, 467; Cro. Car. 38; 2 Browne, 102; 2 Jones, 41; Noy. 57; Yelv. 64; Moor. 599, 465, 684.

4 East, 173,  
Johnson v.  
Toulman.

§ 6. *Averments.* In ejectment, where the plt. declared on a lease for years, *if A so long live*, and did not aver the life of A, it was amended; and, in general, an averment may be amended, or aided after verdict; as Cro. Jam. 44; 1 Saund. 227.

1 Com. D.  
458.—1 Sid.  
61, France v.  
Tringer.

CH. 185.

Art. 8.

§ 7. *Miscontinuance and discontinuance.*

By 32 H. VIII. c. 30, *discontinuances* in *penal* actions as well as *civil* actions are cured. (In fact, *penal* actions now are *civil* actions in many cases.) So misjoining issue and want of colour, but not at *common law*. 6 D. & E. 255, *Humble v. Bland*; 1 Saund. 228, c.

Cro. El. 618,  
619, *Walford's case*.—  
10 Mass. R.  
103.—11  
Mass. R. 11.

§ 8. Error of judgment &c. in case for a robbery, deft. imparled, and the same day was given to the aforesaid Andrews (servant robbed) instead of said Walford, the plt. Afterwards the deft. pleaded, then waived his plea and confessed the action; error brought and assigned a *discontinuance* in giving day to Andrews, a *stranger* to the action, and not to the plt.; not amendable; and held, if a continuance is to be given to two, and is to one only, that is the clerk's *misprision*, and amendable; but where none is given to the party, but is to a *stranger*, as here, it is not amendable; for it is the act of the court, and the deft's. appearance after, did not cure the defect.

Cro. Jam.  
528.—Cro.  
El. 489.—2  
Cro. 211.—1  
Salk. 177.—3  
Lev. 325.

§ 9. In this case the continuance was wholly omitted, yet it was amended, and so no *discontinuance*; and as well when several verdicts in the case as one; as well after verdict as before, may the omission be amended. So as well where the act of the court as of the clerk. So in the *inferior* as well as *superior* court. So a *discontinuance* by the act of the plt. as well as of the deft.; and all these amendments are on 32 H. VIII. c. 30.

1 Wils. 303.  
304, *Rex v.*  
*Ponsonby*.

§ 10. Information in nature of a *quo warranto* from Ireland; day was given here in court, *skipping over two terms*, then judgment was entered, and error brought; amendment refused to add the two continuances, though said to be *miscontinuances* and not a *discontinuance*; so in either case amendable at common law. Court held *discontinuances* or *miscontinuances* before judgment, are the acts of the clerk; but after judgment is entered, and the record made up and closed, *discontinuances* are acts of the court (*Comyns*, 419); "and we have nothing to amend by." So "the Superior Court, where error is brought, may make such amendments as the court below may; but that can only be done when the Superior Court has the same matter to amend by, as the inferior has;" cited *Wentworth v. Clark*. In a like case R. B. sent a *certiorari* to the C. B. to inform &c. if there was any continuance in that court, and sent it up.

1 Stra. 136,  
*Phillips v.*  
*Smith*; many  
cases cited.

§ 11. Debt on statute for a penalty. Judgment in B. R. and error brought in the exchequer; plt. who had judgment, moved to amend: 1. The name of the attorney from *bugi* to *burgi*, before stated: 2. To insert the word *vic'* in the *distringas*, being directed to Somerset *salutem*, omitting *vic'*: 3.

The *teste* of the *venire* from a wrong to the right term: 4. CH. 185.  
To add continuances after several arguments; all allowed. Art. 9.  
Though objected as to first and second, there was nothing to  
amend by; and the court said, continuances might be entered  
at any time. As to ministerial acts, they were amendable  
at common law at any time; but judicial acts not after the  
the same term.

ART. 9. *As to bail, variance, form and substance, by what  
court, &c.*

§ 1. *Bail. Scire facias* against bail. The plt. made a mistake 2 Stra. 11,  
in stating the recognizance, of which the deft. took advantage 65, Grey v.  
by pleading *nul tiel* record; plt. moved to amend, but denied Jefferson.  
for a *scire facias* against bail is never amended, and the  
course is for the plt. to quash his own writ.

§ 2. Judgment in ejectment for two houses, and *scire facias* 3 Salk. 32,  
to show cause why there should not be execution of one of Williams v.  
them; plea, *nul tiel* record; plt. moved to amend his *scire Hoskins*.—1  
*facias*, but refused; for it is a good writ on the face of it, and Salk. 62.  
there may be another judgment in ejectment for one house;  
and the court will not after this plea pleaded, alter it to suit  
the plt's. purpose.

§ 3. And the Court of Common Pleas do not think proper 3 Bos. & P.  
to cure any irregularities of which the bail are entitled to 321, Full-  
take advantage, and hence refused to amend a *scire facias* wood v.  
against bail, the *teste* of it was before the the writ of *ca. sa.*, Annis.  
but the court said their power to amend such writs was cer-  
tainly discretionary.

§ 4. And in this case held a *scire facias* against bail in 2 Bos. & P.  
error, may be amended by the record of the recognizance. 215, Perkins  
The proposed amendment was to insert the costs of the ver- v. Petit.  
dict; *nul tiel* record pleaded; denied in this particular case,  
2 New. R. 103, the court recognized this discretionary power  
to allow amendments in writs of *scire facias* against bail. So  
in the case of Mann v. Calow, amendment allowed where the  
defect was occasioned by an officer of the court; and in this  
case of Braswell, such writ on a judgment, and the declara-  
tion thereon amended in conformity to the judgment roll.

§ 5. A joint judgment against bail on several *scire facias* 1 Ld. Raym.  
writs, is erroneous, and the term which it is entered is not 182, 547,  
amendable. Villars v. Par-  
ry.

§ 6. *Variance* must be objected to at the trial &c.; 15 2 Phil. Evid.  
Johns. R. 210; Dunlap's Practice, 251; 1 Chitty's Plead- 1.  
ings, 304, 307.

*Variance.* Whether variance in one part of the proceedings 7 Cran. 208.  
from another can be amended or not, is a question that de- —1 Com. D.  
pends on the questions generally, if the variance be material 465.—2 Dyer,  
219.—B. N. P.  
171.—1 D. & E. 240.—Cowp. 671.—10 Johns. R. 418.

CH. 185. or not, also if there be any thing to amend by. A special  
 Art. 9. contract must be truly declared on, and any *variance* is fatal;  
 4 D & E. 314, 687; 3 D. & E. 521. Variance in debt or  
 not; 2 W. Bl. 1221; Dougl. 6; 2 D. & E. 129; 1 H. Bl.  
 449, Saxton v. Johnson.

See Ch. 180, § 7. What *substance*, and what *form*, and how amended or  
 a. 14, s. 8. not. No *substance* is within the statutes of *jeofails*; see ante,  
 Ward v. Honeywood, Ch. 184, a. 2; and Dougl. 63; and  
 exception as to amendments, Ch. 184, a. 2.

1 Rol. 207. § 8. Further cases. Debt against an executor; plea, nothing  
 in his hands; replication, assets the *day of suing out the writ*, viz. leaving a blank for the day, here material; but the  
 day is inserted in the paper book and *nisi prius* roll. Plea  
 roll amended; see Oates v. Shepherd; Havers v. Bannister,  
 above.

§ 9. It is one general rule that matter of *form* may be  
 amended, and another that matter of substance cannot be;  
 yet there are some few exceptions to both these rules; these  
 exceptions create considerable uncertainty in regard to amend-  
 ments, and the aiding of defects in process and pleadings. In  
 addition to the uncertainty arising from the question so often  
 occurring in them, What is *form*? What is *substance*?

1 Lev. 190. § 10. In this case it is stated as a general rule, that default  
 in precise certainty is but *form*, where the certainty in general  
 appears; as if a man plead a descent to him, as heir, but  
 shows not *how* heir; this is amendable or aided as matter of  
*form*, if not specially demurred to.

Fort. 186, § 11. So in a writ of covenant of lands in *insula Antigua in*  
 Forster v. *America, in partibus transmarinis in St. Mary, Islington, in com*  
 Pottington. *Surry*; amended by striking out the words *in America, in*  
*partibus transmarinis*, as being only matter of form.

Jones, 199.— § 12. But a matter *material* to the action or of *substance*,  
 9 Geo. II. being omitted, is not amendable after trial, though omitted by  
 the neglect of the clerk; as in debt against the heir, if not  
 stated in the declaration, *he bound his heir*, not amendable  
 after verdict.

Cro. El. 435, § 13. The inferior court from which the record is returned,  
 459, 677.—2 may amend after judgment, both before error brought, and  
 Jones, 212.—2 after, and the clerk of the inferior certifies to the Superior  
 Salk. 49.—1 Court. The writ of error to the lower court is to send up  
 Bac. Abr. “the record in the state and condition in which it ought to be  
 Amendment by law, and that is corrected of all *misprisions* of clerks; or  
 G. on alleging diminution, the record is to be sent up amended as  
 it ought to be, or it may be amended in the Superior Court,  
 if the other refuses; for as it superintends such inferior  
 court, so it may correct the *misprisions* of the clerks of the  
 court.”

§ 14. And the court above, on error brought, intends the record below to be right, if the contrary do not appear. Hence, if the first transcript sent up be defective, and a writ of diminution is sent to the inferior court, and a good record is sent up, though amended after error, the Superior Court "will intend it to be amended at the time of the judgment given, and that the transcript sent up was a diminution by mistake." Hence, if dower be brought against an *infant*, who appears and pleads by *guardian*, and he is amerced, this is error; for an *infant* cannot be amerced for his indiscretion, nor a guardian, for he is appointed by the court. So this is error in the judgment itself, which is not amendable; "and if certified by the clerk of the court to have been amended after error brought, and could not have been amended, but yet certified to the *certiorari*, rightly amended, they will suppose it was amended the same term judgment was given, and during that term whilst matters are in *fiery*, they can rectify not only the *misprision* of clerks, but their own mistakes; but when the deft. in error gets his record below amended, pending error in the point on which it goes, he ought to pay all costs, because he defeats the plt's. writ of error, originally properly sued out; but not if the plt. in error also proceed on some other point or matter not so amended.

CH. 185.

Art. 9.

Cro. Car.  
410, Smith v.  
Smith.

## CHAPTER CLXXXVI.

## PLEADINGS.—AUDITA QUERELA.

ART. 1. *Audita querela*.

§ 1. This writ has occasionally come into view in former chapters; as Ch. 136, a. 17; Ch. 167, a. 2; and named Ch. 178. By this act this form is established; and by this act it is provided, that "in every case wherein an *audita querela* lieth," the party aggrieved may have it in the form of attachment, and *capias*, or original summons, at his election, out of the court whereto execution is returnable. This writ by the said act is to be signed, attested, indorsed, and served as in other cases; and in all cases the deft. may plead the general issue of not guilty; and where brought in the common pleas, an appeal lies to the Supreme Judicial

Mass. act,  
May 18,  
1781 —  
Maine act,  
Ch. 6.

Forms, Ro-  
hun, 185, &c

CH. 186. Court. This writ is of common right. 5 Taun. R. 558.  
 Art. 1. No relief on motion in disputed cases. Id.

22 H. VI. 56. § 2. This is a process not often resorted to in our practice, but the reasons of it exist, and are now usually taken on motion.

4 Bac. Abr. 8. § 3. This writ as well as a *scire facias*, is in the nature  
 —F. N. B. of a declaration; for they state at large the plt's. cause of  
 232. action. This writ lies as well upon matters of fact as matters in writing.

3 Bl. Com. § 4. *Audita querela* lies where the deft. against whom judgment is recovered, and who, therefore, is exposed to execution, or is in actual execution, and is entitled to be relieved on good matter of discharge arising after judgment. As if the plt. has given him a general release, or as where the deft. has paid the debt to the plt. without entering satisfaction on the record. In such cases in which the deft. has good matter to plead, but hath had no opportunity to plead it in the beginning of the suit or after the last continuance; this writ lies in the nature of a bill in equity to be relieved against the oppression of the plt. It is a writ in our practice sued out like any other writ, and states at large the grievance of the original deft. now plt. or complainant in *audita querela*.

§ 5. This writ lies for bail when judgment is obtained against them by *scire facias*, to answer the debt of the principal, and it happens afterwards, the original judgment is reversed; for after judgment against the bail, they have no opportunity to plead this special matter, and therefore shall have their *audita querela*. "But the indulgence now shewn by the courts in granting summary relief on motion, in cases of such evident oppression, has almost rendered useless this writ of *audita querela*, and driven it quite out of practice."

3 Bl. Com. 405.  
 F. N. B. 235. § 6. If the plt. in trespass recovers damages, and releases all actions and demands, between the verdict and judgment, the deft. shall have his *audita querela*, if the plt. afterwards prays judgment and sues execution.

F. N. B. 238. § 7. "A man shall not have *audita querela*, supposing the party will sue execution; but it ought to be alleged in the writ, that he has in fact sued execution."

Hob. 59.—2 § 8. If two joint and several obligors be sued severally, and one satisfies the debt, or the sheriff pays it on escape of one, the other may have this writ.

Mod. 49.—  
 Alford v. Tatnel, 11 Mod. 170. § 9. Judgment was had against one Grise by Ive, and Keys & al. were bail for Grise, and judgment against them on *scire facias*, and this last judgment was affirmed in error; but afterwards the first and original judgment against Grise was reversed.

Cro. Jam. 645, 646, Keys & al. v. Ive.

ed in a writ of error, and thereon Keys & al. the bail, brought *audita querela*; for the court held, the reversal of the first judgment was no reversal of the judgment of *scire facias*, because it was a collateral judgment by itself; but it was adjudged to be a good cause of *audita querela*; for it is *quasi* depending on the first judgment. So if there be a recovery against a gaoler for an escape, and then the first judgment is reversed, he shall have his *audita querela*: so *audita querela* by the bail, after judgment against him for debt upon a *scire facias*, because he was a minor when he became bail; and on the *audita querela* he was discharged.

Ch. 186.  
Art. 1.

§ 20. But if B, a minor, bind himself in a bond to C, and C without a warrant procure D to appear for B, and confess judgment thereon; yet B, the minor, shall not have an *audita querela*, but an action of deceit against D. the attorney.

Cro. Jam.  
694.—1 Bac.  
Abr. 193, 194.

§ 11. If two executors sue execution for damages recovered by the testator, where one of the executors has released, an *audita querela* lies against both; as both are in the wrong in suing out execution after the debt is satisfied.

3 Bl. Com.  
406.—1 Bac.  
Abr. 194.—  
*Audita querela*.

§ 12. So if the debt. be in execution on judgment for debt and damages, and the sheriff or gaoler deliver him out of execution by the assent of the plt.; and afterwards by colour of this judgment, the plt. again imprison the debt., he shall have, on this matter, an *audita querela*, and be discharged.

Roll. Abr.  
307.—1 Bac.  
195.

§ 13. So if the plt. consent that one debt. only be delivered out of execution, the same rule holds, and process may be had. So if one of the bail be delivered out of execution the other shall not be taken.

Stile, 117,  
387, Price v.  
Goodrich.

§ 14. But if A be in prison for debt. and escape by the assent of the sheriff, and then return to prison, and the sheriff keeps him in execution, he shall not have an *audita querela*; for the creditor may elect to detain him in execution, or to sue the sheriff.

1 Bac. Abr.  
196.

§ 15. If A and B are bound in a bond jointly and severally, and judgment is given against each on several actions brought, and both taken in execution, and after A escapes, yet B shall not be delivered on *audita querela*; for the obligee may not choose to sue the sheriff for the escape; and until the plt. is actually satisfied B shall not be delivered.

5 Co 86,  
Blomfield's  
case.—Hob.  
69.

§ 16. *Audita querela*; for that Durrant recovered against Child £14 damages, £5. 10s. costs, and that after Child brought a writ of error, and the judgment was affirmed, and £5 were assessed for costs in error; that Durrant released to Child, between the judgments, all executions and demands, yet he sued out execution as well for the £14 and £5. 10s. the first judgment, as for the £5. 10s. costs in error. Held,

Cro. Jam.  
337, Child v.  
Durrant.

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Art. 1.



2 Saund. 148,  
Turner v.  
Davies.—  
Mod. 62.

though the execution be entire, Child should be discharged, *quoad* the sums of the first judgment being released; but not as to the £5. 10s. the costs of the second judgment, not released; hence, an *audita querela* may prevail in part.

§ 17. If A, an administrator, recover damages against B, and then his administration is repealed, and granted to another; upon a surmise that A intends and endeavours to sue execution, B may have an *audita querela*; for by the repeal of the administration, the power of A is absolutely determined. He had sued out execution. See Pleadings at Large, p. 137 to 148, a.

Hob. 66,  
Corbett v.  
Barnes.

§ 18. If one trespasser satisfy the plt., yet he proceeds against another, this other may have *audita querela*; for though the plt. may have several actions, he can have but one satisfaction. Sir W. Jones, 377; Cro. Car. 443.

Hob. 162.

§ 19. If one, after verdict and before judgment, have a release, he cannot plead it, but must help himself by this writ.

§ 20. The original deft. and plt. in *audita querela*, after stating his case, and judgment against him, &c. prays judgment, and that the original plt. and deft. in *audita querela*, "may be barred from having any execution whatever of and upon the said judgment, so as aforesaid, recovered against him the said —; and that he may be restored to all things which he has lost by occasion of the judgment aforesaid," &c.; and if judgment be for him, it is in substance, in this form. If the deft. plead in bar to the *audita querela*, he says, "he ought not to be barred from having his execution of and upon the said judgment" &c. Turner v. Davies.

The manner of declaring in *audita querela* anciently was lengthy and tedious, minutely stating all matters from the origin of the cause of the original action; but now the mode of declaring is much more concise; and clearly may be so, because the plt. in *audita querela* usually admits there was once good cause of action against him, on which the judgment he states was well recovered; for if no cause of action, he should have shewn this by his pleadings in the original action; and whenever he may do this, even by a plea after the last continuance, and does not, he loses his opportunity, and shall not have an *audita querela*. So usually it is enough merely to state the judgment recovered generally, and then specially to state the after matter; that is, the matter of his discharge, this being the ground work of his *audita querela*, though by our statute above stated, the deft. in *audita querela* may plead not guilty in all cases, yet it is conceived he is not obliged so to plead, but may if he chooses plead specially, defence, as in England, or at common law. This, like

every other special plea or defence, will be according to the circumstances and facts of his case; and this plea must ever be in answer to the plt's. declaration or complaint in his *audita querela*, and shew why the debt. ought not be barred of his execution.

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§ 21. It is agreed on all hands, that this is an equitable action; and is of a most remedial nature; but it applies not where the party had or has any other remedy. Hence, if the ground of his *audita querela* be matter he might have pleaded or shewn in bar of the judgment, he has not this writ; nor if he has any other remedy for the grievance he complains of.

3 Bl. Com.  
405.—2  
Saund. 148, a.  
—1 Rol. Abr.  
306.—Hob.  
283.—1  
Salk. 264,  
Wicket v.  
Creamer.—  
1 Wils. 98,  
Cooke v.  
Berry.

§ 22. 2d. The principle point in considering this branch of the law, is the plt's. ground of complaint, where sufficient to entitle him to bar the execution or not; and applicable to this point there is much good law; and therefore it may be useful to consider the cases, further to be found on this subject; an original plt. who in a due course has obtained his judgment as the acknowledgment of a debt in the nature of a judgment, may lose his right to have execution of it, and so be barred his execution: 1st, By losing his legal power to enforce the judgment; as in *Turner v. Davies*, where Davies got judgment as administrator, and before satisfied his administration was repealed, and granted to John Spicer, who became entitled to the execution: 2. He may lose this right by his own act in three ways: as 1. By his releasing the judgment: 2. By discharging the judgment debtor: or 3. By receiving satisfaction of the judgment.

§ 23. As if on a joint and several bond one obligor is sued in one court and taken in execution, and the other in another court, and his lands are taken in execution, the one imprisoned may have *audita querela*; and as the judgment must be, that he be discharged from the execution, he cannot be taken again, though this land be evicted. The land taken is satisfaction of the judgment at common law.

Hob. 2.—2  
Bulst. 97, 101,  
Cowley v.  
Lydeot.

§ 24. So *audita querela* lies *quia timet*, or for one only in danger of being taken in execution. Hence, one against whom judgment is obtained, may have it before execution sued; but one cannot have *audita querela* before judgment is rendered against him.

Co. L. 100.—  
1 Rol. Abr.  
306.—1  
Saund. 148, b.

§ 25. *Audita querela* is an action founded on *tort*; hence, where against two executors, one appeared and the other was defaulted, the court directed him who appeared, to answer alone, as in cases of *torts*.

1 Saund.  
118, b.

§ 26. No one is entitled to this writ but the party grieved, and only when the matter alleged discharges him; as where two are jointly and severally bound in a bond, and one of

Sir W. Jones,  
95.—5 Co.  
86, Bloms  
field's case.—  
Co. En. 87. a

CH. 186. them is sued and taken in execution, and afterwards the  
 Art. 1. other is sued and taken in execution, and then one dies or  
 escapes, the other cannot have *audita querela*; for the death  
 or escape of the one is no discharge of the other, as it is no  
 satisfaction of the judgment.

§ 27. Where the court will relieve on motion or drive the  
 party to his *audita querela*. See 4 Burr. 2287, Sutton v.  
 Bishop; 2 Stra. 1198, Mitford v. Cordwell; Salk. 264; 2  
 Ld. Raym. 1295, Ludlow v. Lennard; 1 Ld. Raym. 439;  
 12 Mod. 240; 1 Bac. Abr. 631.

1 Salk. 92, § 28. An *audita querela* is no *supersedeas* to the execution,  
 Langston v. and therefore to stay it, a *supersedeas* must be sued out.  
 Grant.

§ 29. Demurrer to *audita querela*. See Demurrer, Ch.  
 181, a. 3, s. 2, 7, 12.

Cro. El. 25, § 30. *Audita querela*, for that the plt. was in execution in  
 Fisher v. debt on a bond made for *usury monies*. He made an attorney,  
 Banks. and appeared, and then judgment against him on *nil dicit*; so  
 that he might have pleaded the usury in avoidance of the bond,  
 and as he did not, held he was not entitled to *audita querela*;  
 because this writ does lie after a judgment for a matter he  
 might have pleaded before; "but when he is condemned  
*by default*, and had no day in court to plead it, there it  
 lieth."

Cro. El. 4.— § 31. And so the party cannot have *audita querela*, if he  
 Hob. 283, have opportunity to plead his matter of discharge, even on  
 Hanner v. *scire facias* on the judgment; and it seems to be a general and  
 Mase.—1 Rol. settled principle, that if a party has any opportunity to plead  
 Abr. 306.—2 or show to the court his matter of discharge, and omits it, he  
 Saund. 148, shall not have *audita querela*; and he has this opportunity if  
 b. c.—1 Wils. duly warned to appear, and he does not; and if not warned  
 98. in fact, he has his remedy against the officer for a *false re-  
 turn*, if he return *scire facias*, when he has not warned the  
 party.

1 Com. D. § 32. So if the land of B be recovered by the collusion of  
 aud. quer. A. A, who appears as tenant, and makes default, B shall have  
 B. his *audita querela*. So where judgment is confessed on a *usu-  
 rious* contract, or obtained by *corin*, or against an *infant*, in-  
 veigled to be bail. Judgment against three, one taken in  
 execution wrongfully, all shall have *audita querela*, though  
 Cro. Car. two of them be not yet grieved, for they are privy to the  
 443. Corbett judgment, on which the one is imprisoned, though objected, he  
 v. Barnes. only ought to have this writ.

1 Rol. 304, § 33. But one need not have this writ where the matter of his  
 A. grievance is void, as if an extent be sued against him without  
 right: aggrieved party how aided on motion. 1 Salk. 264;  
 1 Ld. Raym. 439.

B. Mod. 354. § 34. Nor can an *audita querela* be allowed at the suit of  
 several persons on several judgments and executions.

§ 35. *Declaration and pleas.* If the *audita querela* vary from the record, it may be pleaded in abatement of the writ. This writ may contain two or more matters, "but the plt. must hold himself to one matter, and the deft. shall answer to that." And if one sue on *audita querela*, and has a *supersedeas* to stay execution, and his writ abate, and he sue a second, he shall have a second *supersedeas*; but generally, this writ ought to comprehend but one *gravamen*, and in every case, the plt. must show himself to be aggrieved; but it is sufficient, if the plt.'s declaration shows a sufficient *gravamen*, though it be defective in matter alleged in aggravation of damages, as where said H and B were bound in a statute to Hyott, and he sued execution on it, and thereon Hoxon was taken and let at large by the sheriff of —, by Hyott's consent, whereby H and B were discharged of any execution against them; yet Hyott, to vex them, sued inquisition before the sheriff of S. and the sheriff of H., of their lands and goods, to the same Jacob (Hyott), delivered, where it ought to have been by the two sheriffs procured to be delivered. For, as alleged, the plt. delivered to himself, and this was assigned for error,—but adjudged no error; for the writ shew a sufficient discharge; and what was stated as to the lands &c. was but in aggravation &c., and any defect might be cured by the writ for inquiry of damages, and issue being taken on the point of discharge, and found for him, was well.

§ 36. Adjudged that an *audita querela quia timet*, cannot be sued out by the purchaser of land until after an execution has issued; and that this writ must be allowed in open court, but is not of itself a *supersedeas*; and where the party is not in actual custody, or sues *quia timet*, a *venire facias* is the proper process. New York follows nearly the English practice, as Massachusetts did till 1781.

§ 37. Where the court will relieve on motion, or *scire facias*, or error, or put the party to his *audita querela*, or not; see also *scire facias* error, and Price v. Goodrich, Stile, 117, 387; 3 Leon, 260; Roll. Abr. 308; Bunb. 283, Chubbs v. Billington; Carth. 282; Bunb. 282; Salk. 262; Kel. 634; 4 Mod. 314; Salk. 93; 1 Bos. & P. 427, Lister v. Mundell; 1 Johns. R. 531, n. Wardell v. Eden, Portchester v. Pitue. As relief on motion is usually at the discretion of the court, no particular rules can be laid down; but each case will depend on its own circumstances; however it is a general rule not to relieve on motion where the plt.'s case is doubtful in point of law, though the facts be admitted, nor where the facts are disputed; so the court will not settle disputed law, or controverted facts on motion for relief.

§ 38. The plt. was imprisoned in execution on a judgment 14 Mass. R. 443, Little v. Newburyport Bank; Ch. 65, a. 11, a. 6 &c.

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F. N. B. 238,  
239.—Old  
Ed. 104 &c.—  
Cro. El. 809.  
—Dyer, 297.  
1 Bac. Abr.  
634, 635;  
and Cro. Car.  
163, Hyott v.  
Hoxon & al.  
in error.

2 Johns. Cas.  
227, Wad-  
dington & al.  
v. Wenden-  
burgh.

CH. 186. rendered November term, 1814, (in Essex), for \$5723.15, and  
 Art. 2. costs \$29.8. The Bank (original plt.) liberated him on his  
 note for debt and costs, with two sureties, with an express  
 agreement that if not paid in a time fixed, he was to surren-  
 der himself to prison on said execution; this he did accord-  
 ingly. Held, he had no remedy by *audita querela*; the note  
 was given up by the defts. when they recommitted him. For  
 the cases cited in this case, see Ch. 65, a. 11.

4 Johns. R.  
 191, Baker's  
 case.

§ 39. Where a party may seek relief on *audita querela*, it  
 is usual to grant it on motion, as where judgment is rendered  
 against him the same day he has his insolvent discharge, and  
 which he cannot plead; and the court above said, the party  
 might have sought relief by an *audita querela*; but it is usual  
 to grant the same relief on motion, and the common pleas was  
 right in so granting it.

#### ART. 2. *Mandamus.*

Act of Con-  
 gress, Sept.  
 24, 1789.

§ 1. By this act, section 13, the Supreme Court of the  
 United States has power to issue "writs of *mandamus* in cases  
 warranted by the principles and usages of law, to any courts  
 appointed, or persons holding office, under the authority of  
 the United States.

See Ch. 187,  
 a. 7, s. 30,  
 Massachu-  
 setts Act,  
 July 3, 1782,  
*mandamus* to  
 restore one  
 to office, 6  
 Went. 305,  
 423, The  
 King v. The  
 Bishop of  
 Chester.

§ 2. By this act the Supreme Judicial Court has power to  
 issue writs of *mandamus* and prohibition to all courts of infe-  
 rior jurisdiction, and other processes according to the laws of  
 of the land for the furtherance of justice.

Thus by each of these statutes, the Superior Court is au-  
 thorized to issue this writ "in cases warranted by the prin-  
 ciples and usages of law." What these cases are, is not de-  
 fined in any American statute; but this power is to be found  
 in the common law, and English and American usage.—  
*General principles.*

1 D. & E. 404.  
 —3 Bl. Com.  
 110.—Salk.  
 428, 700.—3  
 Bac. Abr.  
 527.—1 Stra.  
 578.—Regis-  
 ter and Burr's  
 Reports &c.  
 —1 Cranch,  
 137.—2 Bin.  
 362.—Cowp.  
 377, Rex v.  
 Windham.—  
 4 Burr. 2188.

§ 3. *The nature of the writ of mandamus.* It is a command  
 issuing from the Supreme Judicial Court, as named above,  
 (or the K. B. in England,) and directed to any person, or cor-  
 poration, or inferior court of judicature, requiring them to do  
 some *particular* thing, therein specified, and which appertains  
 to their office or duty, and which the Supreme Court sup-  
 poses to be agreeable to right and justice. But regularly it  
 issues only in cases relating to the public or to the govern-  
 ment. It may issue in some cases where the party injured  
 has a more tedious remedy; but it issues in all cases where  
 the party has a right to have any thing done, and has no  
 other specific means to compel the performance; not if he  
 has another remedy, that is, any practicable; he must state  
 all things that intitle him to it. 4 Burr. 2188, Rex v. Askew  
 & al.; 7 D. & E. 52; 7 East, 345.

§ 4. *Cases.* It lies to restore one to an office or franchise  
 3 Bl. Com.  
 110.—1 Wils. 283.—3 Burr. 1167, 1267, 652.—4 D. & E. 699.—8 East, 219.

of a temporal or spiritual nature; to academical degrees, to the use of a meetinghouse, &c. So it lies for the production, inspection, or delivery of public papers and books; to oblige corporations to affix their common seal; to compel the holding of a court &c.

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§ 5. So this writ lies to restore a schoolmaster to his place; so to a probate court to grant probate of a will; and so, 1 Salk. 250, it lies to restore an attorney; so to restore a *sexton*, for this is an *office*; but not to restore an *usher* of a school, for this is a *mere service*; nor to compel the admission to the degree of barrister; Dougl. 353, *Rex v. Gray's Inn*.

Stra. 98.—3  
Salk. 232.—4  
Mod. 281.—2  
Salk. 699.

§ 6. In this case, there was a motion for a *mandamus* to the trustees (defts.) of a dissenting meetinghouse to restore Lloyd, the minister, but denied, because he had not made out a *prima facie* title to the office; and Buller J. said, there was a great difference between a *mandamus* to admit, and to restore. The *mandamus* to admit is merely to enable the party to try his right, without which he would have no legal remedy; but otherwise of a *mandamus* to restore; here he must show a *prima facie* title; for where once he has been regularly admitted, he may try his right in an action for money had and received.

3 D. & E.  
575, 578, *Rex*  
*v. Jotham's*  
*exrs.*—2  
Burr 1045.—  
Stra. 1082.—  
3 D. & E.  
652.—1 Lev.  
23, 113.—  
Trem P. C.  
511, 514, 518,  
—3 Bl. Com.  
111.

§ 7. In England, this writ issues on the oath of the party injured, stating his right, and denial of justice below, on which a rule is generally made to show cause why a *mandamus* should not issue. The first writ is to do the thing, or to show a reason to the contrary; and if no good reason is shown, the second writ commands *peremptorily* the thing to be done. So after a return falsified, and a peremptory one may go before any formal judgment. Stra. 697, *Foot v. Prowse*.

3 Salk. 230,  
*Queen v.*  
*Cory.*—1  
Salk. 166.—  
Salk. 430.

§ 8. *Returns*. A *mandamus* issued to swear church wardens; the return was that they were not chosen. Held, the return was good; for if both were not chosen, the writ ought not to command him to swear one of them. So a *mandamus* to swear those who were chosen, generally return they were not chosen is good; chosen *debito modo*, return not chosen *debito modo*, is a good return. The person who asks for a *mandamus* must designate those to whom to be directed.

Farr. R. 83,  
*Rex v. Tivel-*  
*ty.*—4 Mod.  
63.

§ 9. *Mandamus* to A and B, church wardens of T. &c., to restore Lewis Cogan into the place and office of sexton of said parish; return he was not duly *elected* sexton according to ancient *custom*,—that there was a custom for the inhabitants &c. paying scot, and bearing lot, to *remove at pleasure*; and that he was removed pursuant to so such *custom*. Held, this return was good, and it was allowed.

2 Burr. 782.—  
Cowp. 413,  
*Rex v.*  
*Church war-*  
*dens of*  
*Taunton &*  
*al. Trem.*  
*P. C.* 450,  
454, 472.

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1 Stra. 55,  
Rex v. Mayor  
& al. of Nor-  
wich.

2 Stra. 1259,  
Rex v. Ch. &  
al. of Weobly.  
—1 Sid. 169.  
—2 Sid. 31.

Lofft, 148.—  
2 Salk. 701,  
Green v.  
Mayor & al.  
of Herford.

Dougl. 523,  
527, Rex v.  
Bank of  
England; see  
Ch. 76, a. 2.;  
also 1 D. & E.  
396, and 2 D.  
& E. 259.

2 Ld. Raym.  
989.

5 Com. D.  
25.

3 Salk. 230,  
Rex v. Mayor  
of Chester.—  
2 Salk. 525.  
—2 Salk. 436,  
Queen v.  
Mayor & al.  
of Derby.

3 Salk. 230,  
Rex v. Grow-  
er.—2 Stra.  
981.

§ 10. But if there be an action brought for a false return, and a writ of error be pending thereon, the court will not grant a peremptory *mandamus* during such pendency. 2 Stra. 983, Reeding v. Newell.

§ 11. Wherever a *mandamus* is directed to those who have, and also to those who have not a right to do the act directed to be done, the court will supersede it.

§ 12. A *mandamus* was moved for to direct particular persons to be inserted in the poor rates, on affidavits of their ability, but refused; for the remedy is by appeal, and the court said, they never went further than to compel the making of the rate. As to who is to be rated, the parish officers are the proper judges, subject to an appeal.

§ 13. The court will not grant a *mandamus* to compel the doing of that which is likely to be done without one; and in every case it must be directed to the person or persons who are to do the act that is required to be done.

§ 14. This case was, the king, on the prosecution of Parbury and another, executors of Dawes, against the governor and company of the Bank of England, for a *mandamus*,—and the court refused to grant one to oblige the bank to transfer stock to said executors, to stand in their own name, because there was a remedy by action on the case, if they refused; and Lord Mansfield stated the general principle to be not to grant a *mandamus* but where no other specific remedy existed; also 7 East, 353; 10 Johns. R. 484.

§ 15. It was decided in this case, that no *mandamus* lies to compel a trading company to give one of its members a commendatory mark, though it was proved, that without, he could not carry on his trade with effect. No *mandamus* lies for a private office.

§ 16. The court will of course quash a *mandamus* improvidently issued,—as one to restore nine persons jointly; so one to compel former overseers to account with the present; 2 Salk. 433; or if it join distinct rights in it, 1 Stra. 578; and so if a *mandamus* be directed to one person to command another to do an act; no *mandamus* can be in this form.

§ 17. It is a general principle, that a *mandamus* does not lie to turn a person out of office, and make it vacant, or to turn a fellow out of college. Giles' case; never was a *mandamus* to the justices to grant a license to keep an alehouse.

§ 18. Having thus far considered writs of *mandamus* on general principles, it may now be proper, as it is a very useful process and involves many important matters of law, to consider it more in detail, and as it applies to different subjects in this country, and to this end to state first the few American cases to be found under this head, and deserving

of attention ; and then such English cases, the principles of which enter into our practice. These English cases may be considered, as they respect restoring to office or to some franchise ; admission to some office or franchise ; proving wills and committing administration ; election to office ; producing books, inspecting them, &c ; justices allowing expenses &c. ; appointing to office &c. ; courts &c. to proceed to judgment ; several cases ; proper returns. See Ch. 86 ; see the form, Bohun, 303 &c.

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§ 19. *American cases.* It is not recollected that there are any American statutes which direct the issuing or proceedings in these writs of *mandamus*, therefore, our proceedings, in this respect must be on the principles of the common law, as it is understood we have not adopted the English statutes on this subject.

§ 20. This was an important case in which it was decided by the Supreme Court of the United States, 1st. That a *mandamus* is a proper remedy to compel a secretary of state to deliver a commission to which the party is entitled : 2. That the propriety or impropriety of issuing a *mandamus*, is to be determined, not by the office of the person to whom the writ is directed, but by the nature of the thing to be done : 3. That a *mandamus* may be directed to an inferior court. Connected with these points in this cause, this court also decided, 4. That the keeper of a public record cannot erase therefrom a commission which has been recorded : nor, 5. Refuse a copy to a person demanding it, on the terms prescribed by law : 6. That there are certain acts of a secretary of state which are not examinable in the courts of justice : 7. That he acts in two capacities, first, as the mere agent of the president : Secondly, as a public ministerial officer of the United States : 8. That where the heads of departments are the political confidential agents of the executive, merely to execute his will in cases where he possesses a constitutional, or legal discretion, their acts are only politically examinable : 9. That where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, an injured individual has a right to resort to the laws of his country for a remedy : 10. That it is the essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause already instituted and does not create the cause : 11. But this court, except in the two cases of original jurisdiction, has only appellate jurisdiction ; nor can it have by the constitution of the United States ; not even by act of Congress. Hence, issuing a *mandamus* in this case is not exercising appellate jurisdiction, but original none ; can issue : rule discharged : 12. That delivery is not necessary to the validity of letters patent : 13. A com-

1 Cranch,  
137 to 175,  
Marbury v.  
Madison.

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5 Cranch,  
116, 141,  
United States  
v. Judge Pe-  
ters.—Id. v.  
Judge Law-  
rence.

6 Mass. R.  
462, 464,  
Howard v.  
Gage.—See  
*Quo warranto*,  
below.

mission is only evidence of appointment: 14. When it is signed by the president and sent to the secretary of state to be sealed and recorded, the officer is completely appointed, if the officer be not at the will of the president.

§ 21. Held, a *mandamus* may go to a district judge, to cause his sentence to be executed, though a State legislature should declare that sentence void: so to give judgment, but not to direct the form of it. 3 Dall. 42; 2 Johns. R. 371; 2 Cain. Er. 319; 3 Dallas, 121, 129.

§ 22. Howard and Gage were both voted for as county treasurer in the county of Kennebec. Gage was declared elected by the Common Pleas, and he was qualified &c. Howard moved the Supreme Judicial Court for a rule on the justices of the Common Pleas, and on said Gage to shew cause why a writ of *mandamus* should not go to admit said Howard to said office for the present year, as having been duly elected. The rule was granted and argued, and a *mandamus* refused; but the court held, 1st, Writs of *mandamus* to admit or to restore a person to an annual office are within the jurisdiction of this court: 2. The proceedings upon such writs are according to the course of the common law, the English statutes relating to them not having been adopted in this State. The cases, therefore, in which such writs for the said purposes are an adequate remedy, seem to be, where an office is holden for more than a year, or when the returns involve only a question of law, so that the fact being admitted, a peremptory *mandamus* ought to go. If this court were to grant a *mandamus* to the Common Pleas, it must be to admit Howard to the office of county treasurer, or to shew cause why they did not. That court would probably return that they could not obey the writ, because that Howard was not duly elected to the office. This return, if true, would assign a good reason for not obeying the writ; "and the truth of it could be inquired into by the court, either on affidavit or by jury." The court could not grant a peremptory *mandamus* until the return was falsified; and if grantable after the return falsified by a verdict, in an action by Howard, against the justices, yet such verdict could not probably be found until after the year expired &c.

2 Dallas, 4.

§ 23. Two other cases of *mandamus* in Massachusetts. See *Brown v. Town of Haverhill*, and *Scudder's case*, Ch. 79, a. 8, in regard to ways.

§ 24. Held, a district judge acts in his judicial capacity, in determining what evidence is insufficient for issuing a warrant to apprehend a French deserter, under the ninth article of the consular convention; and therefore, that a *mandamus* would not lie to compel him to issue a warrant contrary to such determination.

In Pennsylvania a *mandamus* was granted, commanding the supervisors of a road to pay an order drawn on them by justices of the peace, under a special statute, and payable out of public monies in their hands, because they were public officers directed to pay those orders, and the payees had no other special remedy. 2 Bin. 275, Commonwealth v. Johnson & al.; Id. 360; 7 East, 353; 2 Stra. 1082; 1 Stra. 159, 536.

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§ 25. The party concerned moved for a *mandamus* to compel the supervisors of Columbia county to audit and pay the account for supporting a pauper, under a certain statute. Refused; for they were only to pay such accounts as had been adjusted and paid by the overseers in pursuance of the justice's order. The justice and overseer need not make inquiry together. Held, the Superior Court would grant a *mandamus* to the judges of the Common Pleas, commanding them to seal a bill of exception, or to amend it, according to the truth of the case; but would not, where a bill was tendered at a term subsequent to the trial.

8 Johns. R.  
323, 327,  
Adams v.  
Supervisors  
of &c.

6 Johns. R.  
279, Sikes v.  
Ransom —  
2 Johns. Cas.  
118.

The court refused a *mandamus* to restore an attorney, because the affidavit did not state that the court had improperly removed him.

1 Johns. Cas.  
134, 179, 241.

§ 26. A *mandamus* in this case was issued in the alternative, and was duly and regularly served, but no return was made to it; and held, that without compelling a return, the court would grant a peremptory *mandamus*, the same thing the court would have done if an insufficient return had been made.

1 Johns. Cas.  
64, The People  
ex relat  
of T. v. Alster county.

§ 27. In this case a person was actually in office by colour of right; and the court refused a *mandamus* to admit another person claiming to be duly elected, because the proper remedy was by information in the nature of a *quo warranto*. This reason was not given in the case of Howard v. Gage, above.

3 Johns. Cas.  
79, The People  
v. the  
corp. of  
New York.

§ 28. The party submitted to a new trial of the cause on the merits in the Common Pleas, and was nonsuited at the second trial. Held, he was too late to move for a *mandamus* to compel that court to give judgment on the verdict found in the first trial.

1 Johns. Cas.  
211, Weavel  
v. Lasher.

§ 29. When the Court of Common Pleas refuses to give judgment in a cause, the Superior Court will not grant a *mandamus*, until after a rule to shew cause has been first granted for that purpose.

2 Johns. Cas.  
68, The People  
v. judges  
of Cayuga.

§ 30. In the Common Pleas administrators recovered less than \$25 damages, and that court gave judgment for them, but not for the costs. Superior court refused a *mandamus* to compel them to give judgment for the costs also; but left the party to his writ of error.

2 Johns. Cas.  
72, Janson v.  
Davisson.

- CH. 186. § 31. *English cases, the principles of which apply in our*  
 Art. 2. *practice, as to restoring to office or to some franchise* 2 Stra.  
 1192; 1 Wils. 11; 1 D. & E. 331.
- Loft, 549. § 32. A *mandamus* will go to restore a person removed  
 from a freehold before he was competent to remove him &c.
- 2 Ld. Raym. § 33. A *mandamus* lies to restore a man to the clerkship  
 1004, 1265, of a trading fraternity.  
 White's case.
- 2 Ld. Raym. § 34. A *mandamus* was moved to restore a clerk of the  
 959, 1334.—4 butcher's company by charter. Holt C. J. thought such  
 D. & E. 125. had been granted, but had been carried too far; and that no  
*mandamus* ought to be granted where the officer may have  
 an action.
- Cowp. 523, § 35. John Gairford was rightfully removed from the of-  
 Rex v. Mayor fice of town-clerk, and this his counsel confessed; but moved  
 & al. of Ux- for a *mandamus* to restore him, as he had no notice to ap-  
 bridge. pear and defend himself. Denied; and if restored, said the  
 court, he will be again instantly removed; and we will not  
 grant this prerogative writ on such an occasion.
- 5 Com. D. If an office be granted to A, to be exercised by him or  
 Mand. A.—5 his deputy, if the deputy be refused, a *mandamus* by A lies  
 Mod. 11. to restore his deputy. Several removed they cannot join to  
 be restored.
- 2 D. & E. 177, So to restore to his office of bridge-clerk in London, being  
 The King v. an ancient office for life, the duty of which was to superin-  
 Mayor & al. tend certain estates appropriated by the corporation to sup-  
 of London. port London bridge.
- § 36. *Admission to office or some franchise.*  
 3 Burr. 1265, Held, that a *mandamus* lies to the trustees of a meeting-  
 Rex v. Barker house to admit a dissenting teacher. This was a meeting-  
 & al.—4 house given in trust for the use of Protestant dissenters  
 W. Bl. 300, (Presbyterians.) The contest was, whether Minds, or Han-  
 same case mer in possession, was duly elected teacher. The depts.  
 briefly re- refused to go to a new election, or to have the question be-  
 ported. tween Minds and Hanmer tried in a feigned issue. *Man-*  
*damus* ordered to issue; and the court said, "where there is  
 a right to execute an office, perform a service, or exercise a  
 franchise; (more especially if it be a matter of public con-  
 cern, or attended with profit,) and a person is kept out of  
 possession, or dispossessed of such right, and has no other spe-  
 cific remedy, this court ought to assert it by *mandamus*; upon  
 reasons of justice, as the writ expresses: *Nos A B, debitam*  
*et festinam justitiam in hac parte fieri volentes ut est justum*;  
 and upon reasons of public policy, to preserve peace, order,  
 and good government." It was objected, that as the legal  
 estate was in trustees, the teacher applying for a *mandamus*  
 had but an equitable right, a matter in chancery only, but  
 the court said, this trust was but form &c. Return with-  
 drawn by leave of court.
- Mandamus to*  
*admit to the*  
*company of*  
*free fisher-*  
*men and*  
*dredgermen*  
*of Fever-*  
*sham. 6*  
 Wentw. 323,  
 332.

§ 37. A *mandamus* was granted "to the keepers of the seal of the University of Cambridge," by their official description, to set the common seal of the university to the appointment of a high steward; and held in this case as in the former, that this writ of *mandamus* is necessary for offices of value and consequence, if there be no other remedy; but no *mandamus* for admission to a parochial church, because there is another specific remedy.

CH. 186.  
Art. 2.

1 W. Bl. 647,  
Rex v. University of  
Cambridge.

§ 38. This corporation was created by statute 15 Ch. II. c. 17, and it directs, they shall appoint a *registrar* &c. and other officers at their pleasure. Many points decided, but to this purpose the sixth point was, that upon affidavit that one of two candidates for the office had a majority only by means of illegal votes, the court will grant a *mandamus* to admit, and swear the other who appeared on the affidavits to have the greatest number of legal votes, and though the first was admitted and sworn into the office, there being no other specific, or at least, no other convenient mode of trying the right; and if voters, after they know the candidate is not qualified, vote for him, their votes must be considered as thrown away and void; and though he in fact, have the greatest number of votes, yet the candidate having the most good votes is elected.

6 East, 356,  
Rex v. Corp.  
of the Bedford Level.—  
See this case,  
*quo warranto*,  
post.

So it lies to admit a quaker, having made affirmation, into the Turkey Company, without taking the oath prescribed by 26 Geo. II. c. 18. See 1 Ld. Raym. 125; and 1 W. Bl. 606; and to a justice of the peace to sign a poor rate. 5 Mod. 275; 6 Mod. 229. So to justices of the peace to make a warrant of distress to levy a rate. 1 Wils. 133. So to give judgment in an excise case: so to take security of the peace to the college, Cambridge; to oblige them to turn out certain fellows of the college, whose places became void for not taking the oaths of supremacy and allegiance. Carth. 448; 5 Mod. 402.

2 Burr. 892,  
899, Rex v.  
Turkey Com.  
—1 Stra. 393.  
—Comb. 203  
—1 Stra. 530.  
—2 Id. 835.—  
4 Mod. 233:

§ 39. To prove wills and commit administrations. 1 Stra. 552; it was to grant administration generally, not to a particular person, as that deprived the ordinary of his election.

§ 40. But in this case, it was to commit administration to the next of kin; though a suit was pending, the consanguinity not being denied, the motion for the *mandamus* to the ordinary, was on affidavits of the death of General Stanwix; and and that Charles Connor was his nephew, and next of kin, as S. left no wife, children, &c. was first a rule to the contending parties to show cause &c.

1 W. Bl. 640,  
Rex v. Dr.  
Hay.—4  
Burr. 2295.

§ 41. *Mandamus* to the ordinary to grant probate of a will; he returned the executor was an absconding person, *incapax* &c. Held, his return was insufficient, and a peremp-

1 Salk. 299,  
Rex v.  
Raines.

CH. 186.  
Art. 2.

6 East, 406,  
Rex v. Inhabitants of  
Horsely.

1 W. Bl 668,  
Lovegrove v.  
Betheld.

1 Salk. 38,  
Blackborough v. Davis.

1 Ld. Raym.  
262, Raines'  
case.—6  
Wentw. 344,  
347, 349, 354.

1 Stra. 555,  
Rex v. Mayor  
of Relstoun.  
—2 Rob. 456.

2 Stra. 1180,  
Rex v. Corporation  
of Scarborough.

2 Stra. 948,  
Borough of  
Calne.

tory *mandamus* issued; held, also, the ordinary cannot insist on security from the executor; but see our statute as to bonds.

§ 42. If there be a *feme sole* next of kin, and the ordinary refuses to grant administration to him, a *mandamus* issues to enforce it; and if two next of kin, a widow and child, the court issues a *mandamus* to him to grant administration to one or the other of the next of kin, though it refused one to grant it to the widow or child.

§ 43. Motion for a *mandamus* to the judge of the ecclesiastical court, to grant probate of a will to A. B. Held, that a *lis pendens* was sufficient cause to discharge the rule. Rule for *mandamus* discharged.

§ 44. Administration was granted to the *grandmother*, and a *mandamus* was moved for to grant it to the *aunt*, and denied; for if granted to a wrong person, it is only *voidable*, and not void, as it is when granted by a wrong court. Also the *grandmother* is as near as the *aunt*, and if in equal degree, the spiritual court has election.

§ 45. The probate of a will is conclusive evidence of a will of personality. The court will not by *mandamus* compel the spiritual court to grant administration where there is a will, though its validity is disputed. *Mandamus* to the justices in sessions to hear and decide an appeal against an award of commissioners &c.; *mandamus* to deft. to admit and swear a freeman &c.

§ 46. *Elections to office, to proceed to.*

Motion for a *mandamus* to the deft. to proceed to the election of a new mayor the next charter day; proved by affidavit, that under a clause to hold over, the present mayor had been in possession four years. *Mandamus* granted. 2 Stra. 949, *mandamus* to choose a capital burgess. 2 Burr. 728, the court will not without special reasons, grant cross or concurrent writs of *mandamus* to go to elections in corporations: 3 Burr. 1386, nor grant a *mandamus* to go to an election of a mayor on judgment of *ouster* till actually signed.

§ 47. This was a *mandamus* to a corporation to elect bailiffs, coroners, and other annual officers, there having been no proper officers for seven years; and 2 Stra. 1003, so to elect a mayor, though one *de facto*, he having no colour of right; and 4 Burr. 2008, so granted after an election merely colourable, and clearly void.

§ 48. *Production, inspection, &c. of books and papers.*

Affidavit was made that the steward, who kept the public books, refused to produce them at the corporate meeting, to enter the election of their members. A *mandamus* issued to him to attend with them at the next corporate assembly.

§ 49. On motion, *mandamus* to the deft. to deliver to the company of blacksmiths, all books, papers, &c. in his custody, as their clerk, from which office he had been removed; but if a *mandamus* be not made out according to the rule, it will be superseded, and another to be moved for.

§ 50. *Mandamus* moved for to deliver up books and papers belonging to the borough of Droitwich. Defence, that Ingram was executor of Mr. Winnington, who had expended monies for the borough, never paid, and that he kept the books &c. as security for the repayment; but *mandamus* granted, and the court said, that if he had any just cause for keeping the books and papers, he might return it.

§ 51. So a *mandamus* was granted to the old overseers of the poor, to deliver the parish books to the new overseers; for *per curiam*, they are public books, and ought to be delivered over, that all the parishioners may have access to them, and the overseers and church wardens for the time being ought to have the custody of them; but one was refused to the officers of the customs to register a ship transferred by the survivor of two part owners, merchants, because the executors of the deceased owner should have joined in the transfer.

§ 52. *Justices &c. allowing expenses &c.*

The court granted a *mandamus* on l. Geo. 34, directed to justices of the peace, to allow the defts., being constables, the extraordinary charges in providing carriages on the then late expedition into Scotland.

§ 53. This was a rule to show cause why a *mandamus* should not be granted to the justices of Middlesex, commanding them to make out a warrant of distress to levy the poor's rate, grounded on affidavit, showing it had been made, and that some of the parishioners had refused to pay it; but that the justices refused the warrant without first summoning and hearing the parties. *Mandamus* granted, and the court said, the justices might return what they pleased.

*Mandamus* to reimburse a surveyor of high ways, directed to the justices of the peace of the county of Chester, commanding them to make a rate to repay him &c.

§ 53. An overseer's account was allowed, and an appeal to the sessions; and they disallowed several items, but neglected to order him to pay the balance over to his successor. Two justices out of sessions had power to enforce this, and on their refusal to interfere, a *mandamus* was granted to the justices of the county, and the rule was to show cause why they or any two of them should not have a *mandamus* against them &c.

A *mandamus* to overseers to account, must show there is no other remedy.

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Art. 2.

2 Stra. 679,  
Rex v. Weld-  
man.

1 W. Bl. 50,  
Rex v. In-  
gram.—3 Mass.  
R. 287.—2  
Burr. 1013.—  
1 W. Bl. 229.  
—5 Mod. 314.  
—2 Stra. 948.

1 Wils. 305,  
Rex v. Clap-  
man.

2 Maule &  
Sel. R. 223.

6 Stra. 42,  
Rex v. Hunt  
& al.—4  
Hunt &c.

1 Wils. 133,  
Parish of St.  
Luke v. Jus-  
tices of Mid-  
dlesex.

1 Stra. 211,  
Hassel's case

4 D. & E.  
246, Rex v.  
Carter.

5 Mod. 420.

CH. 186. *To appoint to office, swear in, &c.*

Art. 2.

Str. 512,  
Rex v. the  
inhabitants  
of Rufford.

§ 55. A *mandamus* was granted to the justices of the peace of the county of N. to appoint overseers in an extra-parochial place, where none had been appointed before, in order to the assessment and payment of poor taxes in that place. This case proves, that when justices have power by statute law to do a thing, and neglect it, they may be enforced to do it by *mandamus*.

1 Stra. 196,  
anon.—1  
Stra. 625,  
Rex v.  
Hearle.

§ 56. On motion, a *mandamus* was granted to swear in a director of the Amicable Assurance Company, created by the king's charter. But it lies not to swear one who has judgment against him for usurpation. Had been elected mayor of Pennyn, *but not sworn*, and *ousted* by judgment for that cause, and not elected after; and held a good return, and that after such judgment he could not be sworn on this first election; and here no error lay in parliament in this case.

1 Wils. 125.—  
2 Hen. & M.  
132.

*Mandamus* to the justices of Middlesex, to swear an overseer to his account; also to the justices of an inferior court to record a deed; also to prove; Dawson v. Thruston and others, justices of Frederick county. Recording a deed is a mere ministerial act, and gives the deed no new effect.

1 Stra. 113,  
Brooks v.  
Ewer & al.

§ 57. *To proceed to judgment &c.* See American cases, before. *Mandamus* to a judge of an inferior court, in the nature of a *procedendo ad judicium* to give judgment on a verdict, though he had granted a new trial for excessive damages. This he had no power to do. So Stra. 530, *mandamus* to justices to proceed to judgment; but 3 Salk. 229. Held, the court will not grant a *mandamus* to compel an inferior court to give judgment, where the party has another legal remedy, to proceed to judgment on an information of a seizure,—and verdict for the plt.; judgment *arrested* on which error lies not; plt., then to have error, must get judgment against himself, and for the deft., for the insufficiency of the declaration, and *mandamus* lies to compel the common pleas to give such judgment.

Stra. 530,  
Rex v. Tood.  
—2 Johns.  
Cas. 215,  
Fish v.  
Weatherwax.

6 D. & E. 475,  
Rex v. Bishop  
of Ely.—2 D.  
& E. 338, n.  
Rex v. Bishop  
of Lincoln.

§ 58. *Several cases.* A *mandamus* to visitor to do some act. Held, if a visitor of a college in one of the universities, refuse to execute his visitorial power, by receiving and hearing an appeal, a *mandamus* to compel him, will be granted; but if he has heard and decided it, his decision is not examinable in K. B.; but a *mandamus* lies to a visitor to hear an appeal, and give some judgment. Deft. was visitor of Lincoln college, Oxford; and the court held, that where, by the statutes of a college, a visitor is appointed, who is to interpret the statutes, and an appeal is lodged with him, the court will compel him to hear the parties, and form some judgment, though they will not oblige him to go into the merits; for it is enough he decides; the appeal comes too late.

§ 59. But where it is doubtful who is the visitor of a college, the court will refuse a *mandamus*; nor has it ever been decided whether a *mandamus* lies to the visitor of a college. *Note*, this case was in 1750, and prior to the above cases in D. & E.; 1 Wils. 266, *Rex v. Bishop of Ely*. CH. 186.  
Art. 2.

§ 60. A *mandamus* does not lie to prevent a molestation against law, as not to molest a preacher &c. Salk. 672.

§ 61. If a proper case be laid before the court, it will grant a *mandamus* to the commissioners of excise to grant a permit. 2 D. & E. 381.

§ 62. Motion for a *mandamus* to three justices of the peace in —, to take security on articles of the peace, exhibited against the deft. in K. B. unable to travel. *Mandamus* granted. 2 Stra. 835, *Rex v. Lewis*, *Rex v. Lewis* & al.

§ 63. If an election be doubtful, it ought to be tried on an information *quo warranto*, not on *mandamus*, as if both claim under the same election, and one is in possession, and the officer *de facto*. 3 Burr. 1452, *Rex v. Banks*. — 2 D. & E. 259.

How a *mandamus* must be directed. 'Stra. 55, 640; Carth. 501; 1 Rol. 409; 2 Mod. 112, 128; 7 D. & E. 543; 5 Burr. 2740. Salk. 433, 435, 436, 699, 701.

*Returns to writs of mandamus, sufficient or not.*

§ 64. When a return to a *mandamus* alleges a suspension or degradation of the party in a university &c., and does not state he was summoned to attend the proceedings, or made any defence thereto, the return is ill. Stra. 557.— 2 Burr. 723, 738.

§ 65. It is not a good return to this writ, to restore a member of a corporation, that he consented to be turned out. 2 Ld. Raym. 1304, *Queen v. Lane*.

A return to a *mandamus, modo et forma sequente*, is well, *Pullen v. Palmer*. After return made, no objection to the writ itself lies. 5 D. & E. 66. 1 Ld. Raym. 496, *Rex v. York*.

§ 66. A *mandamus* to swear in two church wardens, duly elected, a return to it, "not duly elected," is bad, unless it states neither of them was duly elected; but a return of a corporation need not be signed or sealed; and 2 L. Raym. 818; and the swearing of church wardens is only a ministerial act; 1 Stra. 609; nor need the return be sworn to; 1 Sid. 257. 2 Ld. Raym. 1008, *Queen v. Guise*.— 1 L. Raym. 223, *Queen v. Chalice*; *Rex v. Simpson*.

§ 67. A *mandamus* issued to grant administration to the husband, a return is good that states he had parted with all interest in his wife's estate; for then he shall not have administration. Where her will has been made under a power given her by deed before marriage, he is not entitled to it. 2 Stra. 1111, *Rex v. Dr. Bettersworth*.

§ 68. The return of a *mandamus* must be made by those to whom it is directed. Salk. 431; Carth. 500. Mod. Cas. 133.

§ 69. A custom to remove an officer &c. at wil', is good; but it must be returned positively. An attachment is not granted without a preceptory rule to return the writ. Salk. 430, *Rex v. Mayor* & al. of Coventry.

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§ 70. Where the return states a constitution different from that mentioned in the *mandamus*, the return must deny the constitution named in the writ, or the return will be bad. Salk. 431, Rex v. Bailiffs & al. of Malden.

Salk. 431,  
Rex v. Mayor  
& al. of  
Abingdon;  
and 432.

§ 71. A *mandamus* was directed to the mayor, bailiffs, and burgesses, of the town of Abingdon. The mayor alone made return. Held, the others would not disallow it, but he is punishable if he do it against the consent of the majority; and they may take their course against him.

Salk. 336,  
Regina v.  
Mayor & al.  
of Norwich.

§ 72. To a *mandamus* several matters may be returned. but they must be consistent; but bad, if inconsistent; as if an election be returned, and avoided, and also no election be returned.

2 Salk. 430.

§ 73. The court will not grant a rule to inspect a charter in order to make a return before an action on the case is brought.

2 Salk. 433,  
Rex v. Rep-  
ton.

A return of a resignation in a corporate assembly, and election of another into office, is good; and if the return be false, case lies against the corporation.

2 Salk. 428,  
Rex v. Mayor  
& al. of Oxon.

An officer at will is removed, but the corporation does not rely on this power to remove, but returns a misdemeanour, and that is not sufficient, this return is bad, and a peremptory *mandamus* goes.

Stra 115,  
116, Rex v.  
Church-war-  
dens of  
Thame.

§ 74. This was a *mandamus* to the church-wardens of the parish of Thame, to restore John Williams to the office of sexton there. It was an office at pleasure; and held, it was a good return to say, it was their pleasure to remove him, and for that cause they could not restore; and where the removal is without cause, no cause need be shewn; and in such case no summons to the party is necessary as he is not removed for any crime.

2 D. & E. 466,  
Rex v. Mayor  
& al. of Cam-  
bridge.

§ 75. *Mandamus* to the mayor, bailiffs, and burgesses of Cambridge, to admit P. B. into the office of common-councilman. Their return consisted of several parts independent of each other, but not inconsistent. Part bad in law, but the last good, as not elected. Held, the court might quash the bad parts of the return; and put the prosecutor to plead to and traverse the rest, (the last cause,) and to go to trial if duly elected; but if two causes returned be inconsistent, the whole is bad, "because the court cannot know which to believe." That Beales was not a Burgess, that he was not eligible to the office of common-councilman, and that he was not elected, are not inconsistent returns.

2 D. & E. 466.

§ 76. But if two or more inconsistent causes be returned to a *mandamus*, the whole return will be quashed.

6 D. & E. 66,  
Rex v. Mayor

§ 77. "This was a *mandamus* to the depts. to certify the & al. of York.—See 2 D. & E. 269.

election of Withers, as recorder of York. The writ stated the office, the right of election, election, &c. Held, on the return made: 1st, That if several inconsistent causes be returned, the court will quash the whole return: 2. It is inconsistent to state in a return to this *mandamus* to certify &c. the recorder's election, supposed in the *mandamus* to be January 15th, that the corporation was then not duly assembled, and afterwards to state the election of another corporate officer, to wit, January 15th; for the day in such case is material; then its being under a *videlicet* makes no difference: 3. That a return to such a *mandamus*, "that the corporators were not duly assembled to proceed to the election of a recorder," is bad; as it contains a negative pregnant: 4. If the writ state all the proceedings of the election, concluding "by reason whereof A was elected," it is a bad return to say, that "he was not elected:" 5. The deft. should traverse one of the facts alleged: 6. A judgment of *ouster* against one corporator is conclusive against another who derives title under him: 7. After a return to a *mandamus*, the deft. cannot make any objection to the writ itself: 8. If an officer be admitted into office in consequence of a *mandamus*, it is not conclusive, but his title may be questioned afterwards, in a *quo warranto* information.

§ 78. This was a *mandamus* commanding the defts. to restore M. Harman to the office of a freeman of the company, who had been removed. On a return made stating the cause of removal, held, the return must shew the body removing must have proved the charge for which the member was removed; that it is not enough to state, merely he was present when the charge was made, and did not deny it. Return quashed, and a peremptory *mandamus* awarded.

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8 D. & E. 352,  
Rex v. Comp.  
of fishermen  
of Fevers-  
ham.—See 1  
East, 662.

§ 79. A *mandamus* issued which directed an inferior court to give judgment on an indictment. Held, the court would not quash a return to it, merely because it states an erroneous judgment given below; but a writ of error must be brought to reverse the judgment.

7 D. & E. 467,  
Rex v. Jus-  
tices of the  
W. R. of  
Yorkshire.

§ 80. The return is insufficient, if it do not state the party had been summoned to answer the charge before he was removed.

8 D. & E. 209,  
Rex v. Gask-  
in.—2 Salk.  
421.

§ 81. A peremptory *mandamus* is not a judicial writ founded upon the record, but is a mandatory writ, which the court always grants when satisfied of the party's right; and when the reversal of a judgment shews his right, there is no occasion for a new judgment in his favour.

2 Stra. 697.—  
2 Salk 431.—  
Cro. Jam. 206.

§ 82. But a peremptory *mandamus* is not to be granted

CH. 186. pending a writ of error; but no writ of error lies on a peremptory *mandamus*. 2 Stra. 983; 8 Mod. 27; 1 Stra. 536.

1 Maule & S.  
R. 697.

§ 83. Held, where a charter of incorporation directed who should be members of it, and that application be made by them to certain officers of it, on a day certain in each year, and at no other time, and then that they make due and legal proof of their qualification; and A and B claim to be admitted members; and apply to such officers on such day, and offer such proof, but cannot be heard because of other business, a *mandamus* may be granted to such officers, to enter an adjournment to an after day, and to hold a meeting to receive and examine the proofs &c.

9 Johns. R.  
345, Medberry  
v. Collins.  
—6 Johns. R.  
279.

§ 84. As to signing &c. a bill of exception, a *mandamus* was issued to the judges of the Common Pleas, commanding them to sign and seal such bill, or show cause &c. On the return it appeared, that it was not presented to them at the trial, but to them individually, at different times, after the court was adjourned for the term. A peremptory *mandamus* was refused by the Supreme Court: 2. The fact on which such bill is taken must be reduced to writing distinctly, at least during the term; and be presented distinctly to the court; as facts attending the trial are very likely to be mistaken or forgotten if not put in writing at the time. See *Sikes v. Ransom*, 6 Johns. R. 279.

Mc Clung v.  
Silliman, 6  
Wheat. 598.—  
Bohun, 303.

§ 85. A State court cannot issue a *mandamus* to an officer of the United States: so decided the Supreme Court of Ohio.

This writ is not found in the Register or any of the old books.

Dew v.  
Judges of the  
Sweet  
Springs' District  
Court, 3  
Hen. & Mun.  
1 to 47.—Cited  
by the  
app't 1 D. &  
E. 404.—  
Bac. Abr.  
Mand. letter  
K.—3 Burr.  
1268.—10  
Mod 54.—3  
Burr. 1819.—  
6 D. & E.  
651.—2 D. &  
E. 259.—4 D.  
& E. 699, &c.

§ 86. In *Virginia*. *Mandamus* to said judges to admit Samuel Dew to the office of clerk of said District Court. June, 1805, he obtained a rule from the General Court to said judges, to shew cause why a *mandamus* should not issue, directing them to admit him to said office, to which rule they made a return, which contained one objection; that was, that he did not in time offer his sufficient bond and security required by law, on the ground he had not the whole term by law to do it. This was the substance. They appointed another clerk, who became a party; and the General Court finally discharged the rule, thinking the objection valid; from which Dew appealed to the Supreme Court of Appeals. In this, his case was resolved into three questions: 1. Had Dew a legal commission given him by the judges of the Gen-

—1 Rev. Code, c. 66.—Cited for appellee Bac. Abr. Manda. letter A.—2 D. & E. 259.—See s. '4 above.—*Rex v. Jotham*, 3 D. & E. 575.—See s. 3.—4 Burr. 2169.—3 D. & E. 651.—2 Stra. 879, 1003, 1157, 1180, &c.

eral Court? This was not objected to by the counsel opposed to Dew, was deemed insufficient only by Judge Tucker; but valid by the other judges: Second question, Had Dew all the term or session to give bond and security? The statute was express on this point,—he was to give bond &c. at the first session: Third question was, If a *mandamus* was the proper remedy? It was urged against Dew, that as the office in fact was in the possession of another person, the proper remedy was an information in the nature of a *quo warranto* against him. Some reliance was placed on the 9 Anne, and some authorities cited; but all the judges agreed clearly, that a *mandamus* was the best remedy. In Howard v. Gage the office was *de facto* full. 22 above; see 36, Rex v. Barker, like Dew's case; so is 38, Bedford Level; but see 27, 63, Rex v. Banks, and many other English cases were cited both sides, mostly cited above. In addition were cited the following Virginia cases for the *mandamus*, Smith v. Dyer; 1 Call, 562; Nelson v. Brunswick justices; Williams v. the Prince George justices; Bland v. the same. On the whole the authorities, English and American, are much in favour of the *mandamus*, especially the more modern cases; and but few against the *mandamus* in such a case as Dew's. In Virginia, as in Massachusetts and other States, the proceedings in *mandamus* are according to the course of the common law; hence, quite the same in every State; and therefore, the law in one, on this subject, is the law in all.

ART. 3. *Procedendo*.

§ 1. This writ in England issues out of Chancery, in Massachusetts out of the Supreme Judicial Court on said act of July 3, 1782; and on said act of Congress, September 24, 1789, out of the Supreme Court of the United States; and is directed to an inferior court, which unreasonably delays to give judgment, commanding such inferior court to proceed, and give judgment; and if its judges refuse to do so, they may be punished on a writ of attachment &c. Form of the writ, 1 Inst. Cl. 409; Register, 48, 56; but though this writ commands the judges to proceed to judgment, yet it does not direct them to give it in any particular form; and see *Procedendo in Certiorari*, Ch. 138, a. 5, principle there stated.

§ 2. A cause was removed from an inferior court by an *habeas corpus cum causa*, to which a return was made, stating a custom under which the deft. was sued and arrested; the deft. who removed the cause, not having proceeded in it here, the court awarded a *procedendo*, though error was suggested on the face of the proceedings below, the court saying they would leave the deft. to his writ of error.

§ 3. So a *procedendo* was granted to the quarter sessions,

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Art. 3.

3 Bl. Com.  
109.—6 Com.  
D. 92, Ch.  
143, a. 1, s.  
21.—Bohun.  
322, 326.

6 D. & E.  
760, Horton  
v. Beekman.

2 Burr. 749.—  
Institutione Legalis, 115.

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because a *certiorari* had not issued till after the deft. had confessed the assault below. See several forms, Bohun. 323, 326.

§ 4. This writ is scarcely ever used in the United States, so that a *printed* case, in which this writ has been issued, is hardly to be found.

2 Dallas,  
191, 192,  
Grubb's exrs.  
v. Grubb's  
exrs.

§ 5. A *procedendo* granted because the action was removed after the referees had entered on the business under a rule of reference, on *habeas corpus*. Bohun. 323.

ART. 4. *Prohibition generally.*

3 Bl. Com.  
112.

§ 1. This writ is issued out of a superior court, where one is called before a court that has not jurisdiction of the cause. It issues out of the same court as a *mandamus*; it commands the court to which directed, to cease from the prosecution of the suit; and according to the register, the style of the higher court is, *we strictly forbid you to hold pleas &c.*, and according to the register, it is a *writ of right*, and an ancient writ issuing to the sheriff, forbidding him to hold pleas for causes stated. In the United States, it principally concerns our admiralty jurisdiction.

36 to 44.

3 D. & E.  
347.

6 Mod. 388,  
308.—12  
Mod. 132.

§ 2. Justice Buller said, in prohibition, the question is, *Whether the court has jurisdiction,—and not whether the jurisdiction is exercised in a formal and regular way?* Not for inconsistent matters, nor after sentence, but 8 Mod. 194; see Admiralty, Captures, and Seamen; Salk. 135. Denied as to the ship hypothecated by the master, but allowed as to the owners. *Institutio Ligalis*, 500 &c.

Forms of th<sup>e</sup>  
writ, Bohun.  
331, 348; and  
consultations,  
id.

§ 3. This writ of *prohibition* is of great use in England, and especially as to the ecclesiastical courts, which in former times were continually encroaching on the law courts; but no *prohibition* to an ecclesiastical court in the United States, is recollected; but to courts of admiralty, and other courts, they may issue (though as yet very rarely in practice) on the same principles they do in England, nearly.

Act of Congress,  
Sept.  
24, 1789.

§ 4. By this act, section 13, it is provided the Supreme Court of the United States "shall have power to issue writs of *prohibition* to the district courts, when proceeding as courts of admiralty and maritime jurisdiction;" and by said Massachusetts act, July 3, 1782, cited article 2. The Supreme Judicial Court has power to issue writs of prohibition to all inferior courts for the furtherance of justice.

§ 5. The Federal power in this respect seems to be limited to district court in admiralty and maritime causes; but said Massachusetts act, is very general. No case is recollected in which this power has been exercised in this state; and but one case is at present found, in which a *prohibition* has issued in any of the United States; that was in Pennsylvania; a case

much considered. In that case, this writ was issued to the district court. The case was a libel for damages on account of a capture of a vessel as prize, by a belligerent power, which vessel was alleged to be neutral American property, the vessel having been carried *infra prasidia*, or place of safety, belonging to the captors. CH. 186.  
Art. 4.  
3 Dallas, 120.

§ 6. The English cases appear to have but a limited application here; in Federal causes, because of the limited power given by the statute above cited; and in Massachusetts causes, because of the very general powers above cited; however the following cases may be of some use on this subject.

§ 7. Where a matter is properly triable at common law, *prohibition* lies before sentence; but if a party submit to trial, it is afterwards too late; and if it appear in the libel or proceedings of the cause, that the cognizance of it does not belong to the spiritual court; a *prohibition* shall go even after sentence. "It shall go where they have no cognizance of the cause; not where there is only a defect of trial." So if the deft. allege a *custom* or other matter of defence not strictly triable in the court, but submits to trial, and found against him, he shall not have a *prohibition* to save himself from costs &c.; cause shewn against the *prohibition* allowed, and rule discharged. A *custom*, *modus*, &c. only triable at common law. *Per curiam*, a *prohibition* shall not go after a suit is entirely determined, for there is not any to whom it may be directed. Cowp. 424,  
Full v. Hut-  
chins—2  
Burr. 813.—1  
Stra. 187.—1  
Vent. 343.—  
6 Mod. 252.—  
Comb 254.—  
1 Burr 314.—  
1 Mod. 12.—  
2 Salk. 648.—  
1 Ld. Raym.  
435.—1 Sid.  
166.

§ 8. Where a court has no jurisdiction, a *prohibition* may be granted upon the request of a *stranger*, as well as the deft. himself. So upon the motion of the plt. himself, who exhibited the libel. 2 Inst. 607.—  
6 Com. D.  
109.—2 Inst.  
607.

§ 9. But a *prohibition* does not go to a *temporal* court, after judgment, where it appears upon evidence at the trial, that the cause of action arose out of the jurisdiction. 2 Lev. 230.

A party applying for a *prohibition* has no right to insist upon declaring, when the court are clear, that his application is groundless. 1 Burr. 199.

§ 10. If a libel be in the admiralty, after sentence a *prohibition* shall not go, upon suggestion the contract was upon land, if it does not appear by the libel. 6 Com. D.  
108.

§ 11. *Prohibition* lies to a *temporal* court after judgment, where the matter appears to be out of the jurisdiction; so after execution; so after sentence and appeal: must be to prevent some further acts. 2 Inst. 602,  
619.—2 Rol.  
218.

§ 12. So to a court of appeals, where it appears they have no jurisdiction over the subject, even after they have remitted the suit to the court below, and awarded costs against the appellant; and though the party applying for the *prohibition* 1 D. & E.  
552, 557,  
Nottey v.  
Cousins.

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Art. 4.

being the appellant; and Buller J. said, before a party is entitled to a prohibition, it is incumbent on him to suggest what has been done in the court below; when that suggestion is entered on record, if it states facts which are not true, the other party should move to quash it; but if they be not impeached, the court must take them to be true. If the party apply for a *prohibition* any time *before sentence*, he is in time: "no other line can be drawn;" and if a court have jurisdiction of a cause, yet a matter may be pleaded as a *modus*, custom, &c. that *ousts* it of its jurisdiction. *Prohibition* may be merely for the purpose of trying such matter; "for the party applying must declare in *prohibition*;" and if the jury find against it, a consultation goes of course. So if a temporal, or other court, exceed its jurisdiction, this writ may be granted; so if the cause appear to be within it; 6 Com. D., *prohibition A*. So if a single cause of action be divided into several, by *covin* to give them jurisdiction; so if an action be brought in an inferior court, founded on a judgment in the K. B. or C. B.; so if in such court a foreign matter happen that cannot be decided there.

3 H. Bl. 69,  
158, Grant v.  
Gould.

§ 13. Naval courts martial, military courts martial, courts of admiralty, and courts of prize, are all subject to *prohibition*. This long case arose on a motion for a *prohibition*, grounded on a suggestion and an affidavit, and the court held, that the *receiving pay as a soldier*, subjects the receiver to *military jurisdiction*. Hence, the court will not grant a *prohibition* to prevent the execution of a sentence of a *court martial*, passed against A, who *has received pay as a soldier*, (but has assumed the military character merely for the purpose of recruiting in the usual course of that service) though the proceedings of the *court martial* appear erroneous in some instances. The motion and suggestion, in this case entered at large, were expressly grounded on *magna charta*, in favour of the liberty of the subject, state all the proceedings in the court martial &c., stated errors therein; also the affidavit of the plt. in *prohibition*, page, 73 to 83, stating all the facts of his case, and (among others) many motions made, allowed or rejected, before the court martial, as to the evidence there.

§ 14. This great case shows on what broad grounds a *prohibition* may be moved for, argued, and decided. The grounds were:—

§ 15. 1. The plt., Grant, *was not a soldier*, and so not liable to be tried by *martial law*.

§ 16. 2. Evidence was received against him, contrary to the rules of the common law; and evidence for him, which was admissible, was rejected.

§ 17. 3. Supposing him to have been a soldier, yet he

ought not to have been convicted of any offence, with which he was not specifically charged previous to his trial.

§ 18. 4. The offence of which the plt. was convicted, is not an offence cognizable by *martial* law.

§ 19. All these matters, on the motion for the *prohibition*, were very largely argued, both by the court and bar, in twenty-five pages, as also the nature and extent, and progress of martial law in England, the abuse of it in the time of Philip and Mary, and Elizabeth, &c.

§ 20. Lord Loughborough and the court, however, said, that "the foundation of it (*prohibition*) must be, that the inferior court is acting without jurisdiction. It cannot be the foundation of a *prohibition*, that in the exercise of their jurisdiction, the court has acted erroneously; that may be a matter of appeal, where there is an appeal, or a matter of review" &c. Held, by the Supreme court of the United States, that the sentence of a court martial is not conclusive evidence a man is liable to militia duty. 3 Cranch, 331, Wise v. Withers.

§ 21. It is a question, whether the construction of a statute by an inferior court, the consideration whereof arises incidentally in the course of a proceeding confessedly within its jurisdiction, be a ground for a *prohibition*; whether not rather a matter of appeal? But clearly in such a case, a *prohibition* will not lie, unless it be made appear to the superior court, that the party applying for the *prohibition*, has in the proceeding in the court below, alleged the ground of a contrary construction of the statute on which he applies for a *prohibition*; and that this lower court proceeded, notwithstanding such allegation. This is an important distinction, found in many cases, and applies as well in the construction of a principle of common law as of a statute; for why should the inferior court be prohibited proceeding in such construction, if the party do not insist and rely on a different interpretation of the statute or principle of law. This was a case that may, in principle, often happen in our practice. The court of the Commissioners of Appeals in prize causes, issued a *monition* at the deft's. suit, to Parley & al., prize agents, to bring in certain prize effects on a construction of the prize acts, the plt. deemed erroneous; he therefore moved the Court of Common Pleas for a *prohibition*, to forbid the maritime court from proceeding, and stating his case largely in his declaration in *prohibition*, to bring in question this form, in effect, in an action, the rights of the parties. The Common Pleas denied the *prohibition*. Their judgment was reversed in the K. B.; but was affirmed in the House of Lords, on the above distinction. The question of construction of the prize acts, was,

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2 H. Bl. 533,  
Home v.  
Earl Cam-  
den & al. in  
error, in par-  
liament; see  
Camden v.  
Home.

CH. 186. whether a right to a prize *vested* in the captors before the final adjudication in the courts of prize. The prize had been condemned in the lower prize court, and there was an appeal on a point distinct from the question of *prize or no prize*

2 Ld. Raym. 1452, Philpot v. Wharton. § 22. After a sentence in a suit of admiralty, on a contract, a prohibition will not issue, because the contract does not appear to have been made within the admiralty jurisdiction, if stated to have been made within the flowing and re-flowing of the sea within the admiralty jurisdiction.

4 Burr. 1914, Howe v. Napier. — Buck v. Atwood. § 23. In a suit in the Admiralty Court for seamen's wages, if the agreement be specific or under seal, a *prohibition* shall go; but it is said, 2 Stra. 760, where the deed comes in by incident, the admiralty may try if fraudulent or not; and 690, if one part owner sue another in the admiralty, a *prohibition* goes.

2 Salk. 551, Jacob v. Dalton. § 24. A *prohibition* is not granted to a court because it has no power to try one of the facts stated in the pleadings, unless such fact is denied.

1 H. Bl. 100. § 25. So where the subject of a suit in an inferior court is within its jurisdiction; and in its proceedings a matter is stated not within it, a *prohibition* lies not, unless it is going to try such matter. This was a *custom* pleaded, but not denied, so it could not be put in issue.

3 Salk. 82, Aston v. Adams. § 26. A *prohibition* was granted to the plt. in chancery, who had brought a bill on an *indebitatus assumpsit*.

1 Bl. 81, Rex v. Bishop of Ely. Leave to declare in *prohibition* only granted when the court inclines to prohibit. And Dougl. 591, Lindo v. Rodney; Burr. 193.

Cowp. 330, Caton v. Barton. — 2 Salk. 550. § 27. A *prohibition* will be denied where the matter of suggestion is *dehors* the proceedings, unless verified by oath; but granted to a suit in equity for discovery of matters to make the deft. forfeit his freehold.

#### ART. 5. Admiralty jurisdiction.

See Capture, Seamen, Salvage. — 2 Stra. 968 — 4 Burr 1944, 2035. — Hopkinson's R. 56 — 3 D. & E. 267, 270, Menitone v. Gibbons — 1 Com D 375, 376. — 1 Com. D. 269. § 1. As many writs of *prohibition* issue to the courts of admiralty, for exceeding their jurisdiction, it may be useful to inquire briefly what is the line of admiralty jurisdiction. The old books are full of distinctions and confused cases on the subject. The modern distinction is in regard to the subject matter principally, therefore, the admiralty has jurisdiction of a *hypothecation* bond, given in the course of the voyage, though it be executed at land under seal; for the admiralty has jurisdiction of *hypothecation* and acts in *rem*; but 269, Lord Kenyon said, if the admiralty has not jurisdiction originally, its sentence is a nullity, and the party may take advantage of it at any time. *Is coram non judice*. 2 D. & E. 653.

§ 2. The admiralty has jurisdiction of seamen's wages being wholly earned at sea, though the contract be made at land: so of the mate's wages. Salk. 331. But in general the common law has jurisdiction of a contract made in England to be executed at sea, as a charter-party, that the ship shall sail to Jamaica &c.; and of a contract made at sea to be performed in England; as a bond to pay money in London, and according to Hob. 212, the admiralty has no jurisdiction of a writing under seal at land, except as above.

§ 3. If one's goods be seized at sea and brought on land, and there sold to J. S. the owner may, however, proceed in the admiralty against J. S.; for the wrongful taking and the original cause was at sea. By 13 R. II. the admiralty must not meddle with things done in the realm, but only at sea; also 15 R. II. c. 3.

§ 4. The Court of Admiralty it is said, was instituted in the time of Ed. III. and it proceeds by the rules of the civil law; and it is no court of record, so cannot assess a fine. "Appeals from vice admiralty courts in America &c. may be brought before the courts of admiralty in England, as being a branch of the admiralty jurisdiction, though they also may be brought before the king in counsel;" but in case of prize vessels taken in war in any part of the world, and condemned in any Court of Admiralty or vice admiralty, as lawful prize, the appeal lies to certain commissioners of appeal."

§ 5. By this statute the admiral and his deputy, are only empowered to meddle with things done at sea. What is at sea? And this statute declares, he has no cognizance of any contract or thing done within the body of any county, by land or water, or of any wreck of the sea; but things *flotsam* &c. are in the sea. If one vessel damage another in the Thames, it belongs solely to the common law; for it is in the county. And 3 D. & E. 315, *Velthasen v. Ormsley*.

§ 6. To give the admiralty jurisdiction of a cause, the general rule laid down in the books is, that it must wholly arise at sea; hence, where an agreement was made at sea, for well transporting sugars, and put into writing in Barbary, and the sugars spoiled at sea, the admiralty was prohibited proceeding; but otherwise if the writing had not been at land under seal, but only a simple memorandum of the agreement: so the *plt.* was prohibited to proceed in the admiralty on a contract made at Malaga.

§ 7. The common law has jurisdiction if part of the cause arise at sea and part at land; as where a contract is made

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Art. 5.

3 Bl. Com.  
106, 107.—  
Seizures;  
suggestion  
for a prohibi-  
tion to the  
Admiralty  
Court.—*Li-*  
*bel* for an as-  
sault, 6  
Wentw. 293,  
295.

Cro. El. 5,  
2 H. Bl. 532.  
—5 East, 23.  
—1 Acton,  
36.—13

Rich. II. c. 6.  
3 Bl. Com.  
68, 69.—12  
Co. 104.—1  
Com. D. 382.  
—Co. L. 260.  
—4 Inst. 136.  
—Yelv. 134,  
135.

13 Rich. II. c.  
5.—15 Rich.  
II. c. 3.—But  
see *Seizure*.  
—3 D. & E.  
315.—Cro.  
Jam. 514.

Hob. 79, 212,  
213, *Palmer*  
*v. Pope*.—3  
Bl. Com. 106.  
—3 Salk. 23.  
—Cro. Car.  
296.

3 Bl. Com.  
106.—Hob.  
212, 213,  
—45 Ed. I.—  
7 R. II.

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3 D. & E.  
270, 344.—1  
Rol. 271.—  
Dougl. 594,  
Le Caux v.  
Eden.—1  
Com. D. 374.  
1 Galles, 563.  
—4 Inst. 134.  
—But see a.  
9, s. 8.—1  
Phil. Evid.  
266, 267, &c.  
—Ch. 227, a.  
23, s. 30 &c.

Mod. 756.—3  
Inst. 113.—1  
Com. D. 371.  
—1 Rol. 175.  
—Gro. de B.  
P. L. 3, C.  
9, s. 16.—H.  
P. C. 77.

28 H. VIII. c.  
16.—1 Com.  
D. 371, 372.

at land, and broken at sea, "which are two several acts, yet because these two must concur to make the cause of the suit, which is entire," the party shall be forced to sue in the common law courts; because the common law, in such cases, prevails against other courts and laws; and every libel in the admiralty must lay the cause of suit on the high seas; and it is not enough to lay within the maritime jurisdiction generally; for the libel must expressly warrant the suit in the admiralty, in itself; though one may surmise the contract was made at land against the libel that lays it on the sea. 5 H. VI.; 2 H. IV.; 6 H. VI.; 8 Ed. II.

§ 8. The admiralty has exclusive jurisdiction of prize questions, "even if the capture be on land, provided it be by a naval force;" and in matters of prize, this "jurisdiction depends not on locality, but on the subject, which is governed by the *jus belli*, and not by the rules of the common law, and belongs exclusively with all its consequences to the admiralty." So over the question of freight claimed by the neutral master against the captor, taking the goods as prize. 3 D. & E. 323. But in other matters the admiralty jurisdiction is limited to things done *super altum mare*, and out of the country; and what act is or is not done or committed within the country, is a question of fact, sometimes involving matter of law; and in the United States where there are so many great bays and wide rivers, it is often a difficult question to decide. It is stated in English books, if you can see from one point of land to another, all within is within the county, so common law jurisdiction. It may be doubted if this is the rule in the United States; for instance, a person may see from Montaug Point, east end of Long Island, to the Connecticut shore; yet it is a question if murder or other crime committed in the sound, is a crime committed within any county or federal district. The line of distinction is material, not only as to contracts and torts, and crimes generally, but particularly as to piracy or robbing *super altum mare*; for the same act done within a creek, port, or other part of a county, is a felony triable by common law; as on the Thames, as being *infra corpus comitatus*. Piracy does not alter the property of the goods; nor does a pardon of all felonies pardon piracy. By the English law all felonies on the sea are within the admiralty jurisdiction; as rape, larceny, sodomy, manslaughter, &c.; and before 28 H. VIII. c. 15, were generally, as was treason also, triable by the course of the law, by which the offender could not be convicted or executed without confession or express testimony; but by 28 H. VIII. c. 15, all treasons, felonies, robberies, murders, &c. on the sea, or where the admiral had jurisdiction, were made

triable, as if done on land; and of course triable according to the course of the common law, whether tried in the law courts or before special commissioners; but this statute did not alter the nature of the offence, "which shall be determined by the civil law, but the manner of trial only." The admiralty has cognizance of the misconduct of captors. Several cases, Seizures, Ch. 224. This statute does not extend to offences within creeks, ports, within a county.

#### ART. 6. *Hypothecation.*

§ 1. This is when the thing is held without delivery, and by naked agreement only, but when the thing is delivered to the creditor, it is a *pignus* or pledge. Molloy, 213, Moor. 918.

§ 2. By the marine law every contract of the master implies an *hypothecation*; but by the common law only when expressed. But he can hypothecate only in a foreign country. The principle is from the Roman law; by that the *hypotheca* was, where the possession of the thing pledged remained with the debtor, like the mortgage of land, when the mortgagor remains in possession.

§ 3. It is absolutely necessary the master have power to hypothecate the ship in a foreign country, in order to raise money to refit, and this power is impliedly given him in the very act of constituting him master, by the marine law. So he may also hypothecate the goods. 1 Salk. 34: but he cannot pawn for his own debt; 3 Salk. 24: nor make his owner personally liable. 6 Mod. 79; 2 Sid. 161; 4 Dall. 225; Noy. 25; Hopkinson's R. 49.

§ 4. *Case on prohibition to the admiralty.* It was thus: P. Barnard owned the ship Bonaventure, and sent her to Spain, and made Williams master, who (as was alleged in the admiral court) did on the high seas borrow of Bridgman £50, for the repayment of which he pawned said ship, and returned home, and the ship lying in the Thames, Bridgman arrested her in the admiralty. Barnard the owner claimed her as his property, denying Williams was owner, or that he had any power to pawn her. Judgment was against the ship for the debt. On a *prohibition* brought and allowed, held, the admiralty law was reasonable; and that if the ship be at sea and take leak, or otherwise, want victuals, or other necessities, whereby she herself be in danger, or the voyage of being defeated, that in such case of necessity, the master may pawn for money, or other things, to relieve such necessities by so employing the money; for he is intrusted with the ship and voyage. But the *prohibition* was allowed in this case, because it was not said to be for such necessity, or at sea; and there is no pretence the master can pledge for his own debt; but though the master has the power abroad

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Mod. 756.—  
3 Inst. 114.—  
H. P. C. 77.  
—8 Cranch,  
421.—1  
Com. D. 379

3 Rob. Ad. R.  
196.—Civil  
Law Inst.  
L. 4, 16, s. 7.  
—Hob. 11.  
Salk. 34.—1  
Ld. Raym.  
576.—Doug.  
103, Yates v.  
Hall.—2 Bl.  
Com. 159.—  
Cowp. 636.—  
1 Pet. 37.

2 Pet. 295.—  
6 Mod 79.—  
Park on Insu.  
471, 472.—  
Bee's Ad. R.  
341.—But  
see 2 Cain?  
77.

Hob. 11, 12,  
Bridgman's  
case.—Park.  
472.—Doug.  
103.—2 Mar-  
shall, 638,  
639, &c.—  
Molloy, 6, L.  
2, c. 2, s. 4.—  
Laws of  
Oler. art. 11,  
s. 22.—2 Eq.  
Ca. Abr. 512.

CH. 186. from the necessity of the case, and to complete the voyage, he has no such power in the place where the owner resides.  
 Art. 6.

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 Park, 472. If the owners do not agree in sending the ship to sea, the majority shall carry it, and then money may be taken up by the master on bottomry for their proportion who refuse, though they reside on the spot, and it shall bind them all.

Salk. 36, § 5. By hypothecation the master can only make the ship liable, not the owners. Held, on motion for a *prohibition* to Johnson v. the admiralty, libelled there: suggestion for the *prohibition* Shippen.— was, the contract was made at land, to wit, Boston, in New Same case, 11 Mod. 30. England; but it appeared the master was obliged to hypothecate for necessities taken up to supply damages done by a storm there. *Prohibition* refused; and the court resolved, —And 1 Ld. “that when a ship in a voyage is in distress, this court will Raym. 962, allow the admiralty jurisdiction in case of an hypothecation, 806. because this court cannot give the party so proper a remedy as the maritime law can.” Also the original cause was stress of weather; “and where shall a master hypothecate his ship unless he does it upon land.” This too, is the only security he can give; for the maritime law does not allow him to sell, but only to mortgage his ship for the reasons stated; this, as he is no owner, he cannot do by the common law.

1 Ld. Raym. § 6. *Prohibition moved for to the admiralty.* A ship in the 152. Thames was libelled against for seamen's wages. She had not been sent to sea. Held, no prohibition ought to issue: so held, the admiralty had jurisdiction for seamen's wages earned by services done solely in port in trying the ship with a view to a voyage; and if earnt at sea, a charterparty made at land is only to ascertain them; and they remain subject to the admiralty jurisdiction.

Osman v. § 7. But the master cannot hypothecate before the voyage Wells & al. 6 is begun; nor is she liable for repairs done by his order in a Mod. 238.— home port, or the money she sells for; as in such case there is no lien on her. Also 2 Ld. Raym. 1044, 1247.

Lister v. § 8. Nor is the ship liable on his contract, without an express hypothecation; nor for monies not taken up for the Baxter, Stra. 696.—1 tackle, victuals, &c. of the ship; hence, not suable by the Vezey, 154, marine law; and if sued in the admiralty, in such cases, a Buxton v. *prohibition* issues. Snee.

1 Salk. 34.— § 9. The principles on which the masters may hypothecate: 1. Necessity for the safety of the voyage: 2. In a 2 Ld. Raym. strange port: 3. No owners, and no funds, of them or of the 806, Justin v. master: 4. No other means there: 5. Sum lent must be at risk Ballam. on the ship. 3 Johns. R. 352.

2 Pet. 296.— § 10. *Hypothecation.* The master's power to hypothecate 2 Dall 194. being of necessity, is to be exercised only when really, and —2 Stra. 707.

1 Wheaton's § 10. *Hypothecation.* The master's power to hypothecate R. 96, 111, being of necessity, is to be exercised only when really, and Aurora.

in fact, indispensable; therefore his hypothecation of the ship is not valid, and is at the lender's risk, unless he shows that his advances were in fact necessary to effectuate the objects of the voyage, or to the safety of the ship; and also that the supplies could not be obtained on the owner's credit, or with his funds at the place; and if a second be made to pay off the first, it must stand or fall with it; and the subsequent lenders can only claim on the same ground with the preceding, of whom they are virtually the assignees. Hence, all lenders on hypothecation must at their peril see on what foundation they lend. The first bottomry bond was given at Port Jackson, in New Holland, and the second at Calcutta, in part to pay the first; also for further repairs. Libel on the second bond not supported: 1. The master is the owner's agent, but his authority is limited to the objects of the voyage, directed or allowed by the owner: 2. Then the creditor must show the master acted within the scope of his authority; that the credit was essential to those objects, and not otherwise reasonably to be obtained: 3. The reason does not exist if the master has sufficient funds of the owner, nor if his credit at the place is sufficient: 4. The lender must give his credit, expressly intending at the time to have as his security such bond; and the master must receive it with the same intent: 5. Material men and others who furnish supplies to a foreign ship have a lien on her, and can proceed in the admiralty against her; and to satisfy this lien the master may hypothecate, and to relieve her from actual arrest, and borrow therefor, if his only resource: 6. If there be in the lender's bond some matters valid, and some not, it is incumbent on him to show which are valid. These positions founded on the best authorities, are near all the principal ones on this subject. One question, however, is not considered. Is the lender bound to see the monies he lends truly applied? As to this question the authorities are not agreed. All agree he must act *bona fide*, and not collude with any one; and the best authorities require no more of him, nor does reason, where the master appears to be capable and honest. Authorities formerly otherwise; Emerigon, F. 2, p. 434, 441; See Bottomry and *Respondentia*, Ch. 76, a. 3.

A owns the ship and B the cargo, the master has power to pledge the cargo of B to repair A's ship in cases of necessity. Viewed as a new and important question. B's cargo was on freight, and the hypothecation was essential to prosecute the voyage.

§ 11. A public vessel of war of a friendly power coming into our ports is not subject to our jurisdiction *prima facie*, but our government may, if it please, exercise jurisdiction

CH. 186.  
Art. 6.

Loccen. L. 2,  
c. 6, s. 12 —  
Bynkershoek.—  
Le Guidon.  
—2 Marshall,  
638, 639.

3 Rob. R. 196  
to 227, Am.  
ed.

7 Cranch,  
116, 147, The  
Exchange.

CH. 186.  
Art. 7.

over it. Private vessels are subject, from their entering our ports, to our laws, of course.

2 Stra 707,  
858, 937.—  
4 Burr. 1944  
—Stra. 761.  
—2 Stra. 858,  
968 —1 Salk.  
31.—1 Com.  
D. 379.—1  
Vent. 1.—1  
Ld. Raym.  
446.—2 Wils.  
264. Ross v.  
Walker.

ART. 7. *Seamen's wages &c.* See that head. The admiralty has jurisdiction of the wages also of the mate, carpenter, and boatswain; but not if secured by special agreement in a manner not usual; but it may try if a deed be fraudulent or not, executed by mariners to forfeit their wages in certain circumstances; if the deed come in incidentally: not of master's wages; but has jurisdiction in a suit against the ship for the building, mending, saving, victualling, &c.: so of a suit for annoyance to the navigation of a sea within a river: so of a suit brought for the rescue of a ship taken by process of the court, if of the original cause; but not of a pilot's wages, (though a mariner) earned within the county; and a *prohibition* was granted; for both the contract and labour were within the county; otherwise of a contract made at land for an intended voyage, and it fails after work done on board in port. All are mariners who assist in navigating the ship, (except the master;) even the surgeon is.

1 Rol. 530.—  
1 Vent. 32.—  
1 Lev. 267.—  
Ray. 473.—  
Skin 59.—1  
Com. D. 380.  
—1 Salk. 32,  
Broom's  
case.—1 Sid.  
418.—1 Lev.  
267.

§ 1. *Foreign sentence, how executed here.* A sentence of the admiralty in parts beyond sea, may be executed here by the English admiralty, on receiving letters missive for the purpose; and though the sentence be for matter on land, yet no *prohibition* goes to the admiralty here, executing such sentence, if nothing further is done; for the court will give credit to the sentence there; as if a foreign admiralty adjudge a ship to be prize, and after a sale here on land, there is a suit for an account, a *prohibition* shall not go; for it is only an execution of the sentence abroad, adjudging it prize; but one goes if there be a suit in the admiralty, to execute a sentence in a foreign court, not final.

1 Day, 142.—  
1 Bin. 220.—  
1 Bay, 8.

§ 2. Where the admiralty sentence is final and conclusive. See *Bernardi v. Motteaux & al.*, other chapters; *Christie v. Secretan*; *Garrels v. Kensington*; *Havelock v. Rockwood & al.*, Ch. 227, n. 23, n. 30.

1 Com. D.  
381.—Hard.  
502.—2 Rob.  
R. 192, Am.  
ed.

§ 3. *Plea.* To a libel in the admiralty, the deft. must plead. He may plead matter of discharge good in law; and if it be refused, or determined contrary to statute, a *prohibition* goes, as the statute of limitations &c. Though the mate becomes master, he may sue in the admiralty for all his wages &c.

ART. 8. *Other cases of prohibition in admiralty causes; prohibition issued.*

1 Com. D.  
333, Admir-  
alty, F. 2.—  
4 Inst. 138,  
139, 140, 141.—1 Com. D. 383.—2 Ld. Ray. 984.—4 Inst. 135, 139, 140 —1 Rob. 133, 533.

§ 1. Whenever the matter is within the county, and all flats not covered by the tide, and all coasts, shores, ports,

and harbours, and all waters, where one can see from one bank to the other, are within the county: so all vessels in port; and so *prohibition* goes whenever the admiralty sustain a libel against the owners of a ship, or on an indenture, bond, or specialty, made on land beyond sea, to pay money to go beyond sea, or for trees cut in Spain, or on a bill of exchange payable in London, for merchandise in France: so if the thing be done on the sea, if the original of the act was on land; as if a promise be made on land, the ship shall safely go her voyage, and she is lost at sea, or a policy of insurance on land made to the same intent. And Hob. 212, above; and 1 Salk. 34.

CH. 186.  
Art. 8.

§ 2. But a *prohibition* does not go if the libel in the admiralty be founded on one single continued act, which was principally upon the sea, though part was upon land; as if the mast of a ship be taken upon the sea, though it be afterwards brought to shore; or for the restitution of money agreed, upon the sea, to be paid for the ransom of a ship from pirates; though borrowed on land afterwards, for payment; or if a ship be taken by pirates on the sea, and sold by them on the land; for their sale is void: so as to goods; but otherwise, if sold in market overt, then the property shall be decided by the common law; and so if a ship be taken by enemies upon the sea and retaken, whereby the property is altered: so if the sails or tackle of a ship be sold or pledged upon land.

4 Inst. 139,  
140, 142.

1 Com. D.  
Adm. F. 5.—  
1 Roll. 529,  
533.—Hob.  
212.—Hard.  
183.—1 Vent.  
308.—1 Ld.  
Raym. 271.—  
2 Suund. 260.  
—1 Rol. 521.  
—1 Vent.  
174.

§ 3. If a ship taken upon the sea be stranded or damaged in port, the admiralty has jurisdiction: so if the sails of a ship be on land; for they belong to her; but not of wreck. And goods floating on the sea and afterwards cast on land, are wreck. 1 Rol. 531; 1 Com. D. 386: and *flotsam* cast on shore, is wreck; 2 Mod. 294: and if taken by one who has no title, he is suable at common law, and in no manner in the admiralty; "for there is no need of condemnation thereof, as there is of prizes."

1 Sid. 367.—  
Sho. 179.

Lady Wind-  
ham's case.

§ 4. If one part owner of a ship will sue another who will go to sea in her, to oblige him to give security, *prohibition* shall not go till security be offered and refused. Carth. 26; 6 Mod. 162; 2 Pet. 288.

Strn. 890,  
Dimmock v.  
Chandler.

§ 5. But if the suit in the admiralty be to sell, or give security, *prohibition* as to the sale, but not as to the security.

1 Wils. 101,  
Ouston v.  
Hebden.

§ 6. And generally it is absolutely necessary in causes civil and marine, to give jurisdiction to the court of admiralty, that the libel allege the cause of suit to arise upon the high seas.

Ld. Ray. 223,  
235.

§ 7. A ship was captured and her master agreed for her ransom, and gave himself a hostage. The owners refused

Dougl. 615.  
—1 Ld. Ray.  
22, Wilson  
v. Bird.

CH. 186.  
Art. 9.

Ld. Ray. 223.  
—2 Stra. 890.

to pay. Held, he might proceed against the ship in the admiralty for his redemption; for such a case must be decided and settled by the marine law: so now if part of the owners sending their vessel to sea, give security according as is directed by an admiralty court, to those disagreeing, their recognizance may be enforced in that court. 2 Pet. 288, Willings & al. v. Blight.

ART. 9. *American cases.*

2 Dallas, 122,  
Respublica v.  
Lucase.

§ 1. The Delaware is within the admiralty jurisdiction. 1 Dallas, 49, 95. Though the admiralty cannot take a recognisance, yet it may a caution or stipulation, in the nature of a recognisance. A recognisance is matter of record, and the admiralty is not of record.

1 Dallas, 218,  
Donne's adm.  
v. Penhallow  
& al.

§ 2. The question to be tried is not directly that of prize, but is a question arising upon the immediate and necessary consequence of a vessel's being taken as prize; such question is solely of admiralty jurisdiction, and no action will lie at common law.

3 Dallas, 6,  
16, 159; p.  
6 to 13, Glass  
& al. v. Sloop  
Betsey; pp.  
133 to 170.

§ 3. The district courts possess all the powers of a court of admiralty, considered as an instance or prize court. They have jurisdiction on a libel for restitution of a vessel captured as prize and owned by neutrals and Americans. The admiralty jurisdiction exercised by the consuls of France in the United States was not of right, not being warranted by treaty.

1 Johns. R.  
471, 485,  
Wheelwright  
v. Depeyster.  
—See Ch 224,  
Seizures, Ex-  
ceptions.—3  
Dallas, 6, 16,  
Glass v. The  
Betsey.—3  
Dallas, 120,  
U. States v.  
Peters.—3  
Dallas, 188,  
198 —1  
Johns. R.  
471.

§ 4. 1. Belligerents cannot establish prize courts in a neutral country; nor can they make any sale of their prizes there, unless authorized by treaty: 2. The property in goods captured cannot be transferred, so as to divest the right of the original owner, but after a sentence of condemnation by a proper court: 3. The court of the captor's sovereign is the competent court to decide on the legality of the capture: 4. Prize courts proceed *in rem*, and cannot adjudicate on a prize lying in a foreign port, nor out of the jurisdiction of the captor's sovereign or his ally: 5. Though the common law courts cannot inquire into the direct question of prize, yet may in a question of property decide whether condemnation or sale has been made by a court of competent authority: 6. A court of admiralty cannot carry an agreement into specific execution or give damages for the breach of it. Held, the district courts have jurisdiction on the subject of *salvage*. See the cases of salvage above. If one joint owner bring trover, it is only in abatement.

2 Cranch,  
187, 239.

§ 5. And the admiralty courts of the United States have jurisdiction in cases of salvage, where all the parties are aliens, if the jurisdiction be not objected to. Ch. 40, a. 6, s. 20, this case at large; Church's case.

§ 6. The question of forfeiture of a vessel under the act of Congress against the slave trade, is of admiralty and maritime jurisdiction, as a matter arising wholly on the sea. See *Seizures*. 2 Cranch, 406, *United States v. Schooner Sally*. CH. 186. Art. 9.

§ 7. Held, in this case, 1st, The district courts of the United States are courts of prize: 2. Have power to carry into effect the sentence of the old continental courts of appeal in prize courts: 3. In all proceedings *in rem*, the court has a right to order the thing to be taken into the custody of the law: 4. It is presumed to be in it, if the contrary do not appear: 5. The thing does not follow the appeal into the Superior Court; but remains in the court below, which has a right to order it to be sold, if perishable, notwithstanding the appeal. 2 Cranch, 61, *Jennings v. Carson*.—4 Cranch, 2, 28, the same case affirmed.

§ 8. In this case decided that all seizures under laws of impost, navigation, or trade of the United States, where the seizures are made on waters navigable from the sea by vessels of ten or more tons burden, are civil causes of admiralty and maritime jurisdiction, and are to be tried without a jury: and 2. The question whether a seizure for violation of a law of the United States, is of admiralty or common law jurisdiction, is to be tried by the place of seizure, not by the place of offence. 4 Cranch, 443, *U. States v. Schooner Betsey and Charlotte*.

§ 9. The Continental Court of Appeals in prize causes, had the power to revise and correct the sentences of the State's Court of Admiralty; and the State legislature cannot annul the judgments of a Federal court, nor determine their jurisdiction: decide &c. if a State be not necessarily a party. 5 Cranch, 115, *U. States v. Judge Peters*.

§ 10. An information for exporting arms and ammunition contrary to the act of Congress, is a cause of admiralty and maritime jurisdiction. It is also a civil cause, being a process in the nature of a libel *in rem*: 2. It follows of course, as it is a civil cause, no jury is necessary: 3. As it is a cause of admiralty and maritime jurisdiction, an appeal lies from the District to the Circuit Court. 3 Dallas, 297, case of the *Vengeance*.

In this case of the *Vengeance*, the owner appeared and claimed the property, and did not plead not guilty, so treated it as a civil and not as a criminal cause; this is admitted by those who hold it was a criminal cause to be tried by a jury. The decision in this case has been since three times recognised as law, as in the cases of the *Sally*, and *Betsy & Charlotte*, above, a. 6, a. 8; and of the *Samuel*, Ch. 224, a. a. 8, s. 2. It has been contended with great earnestness in the said *Law Journal*, that all these and such cases, are criminal causes, to be tried by jury, the common law side of the court, and that such cases in England are so tried in the Ex- 1 *Law Journal*, 366, 400. —3 *Bac. Abr.* Phil. ed. p. 636.

CH. 186. chequer; cite Parker's R. 21, 273, 182, 227; and 1 Anstruther's Exchequer Cases, 52; Hale's Treatise on the Customs, vol. I. 226; that all forfeitures accruing to the crown are cases so to be tried, whether they accrued by land or water. It is admitted that the decisions in our Colonies were like these American decisions. I have not room here to examine the questions; we must consider these decisions as law until different ones be made. Perhaps in some future case the subject will be more elaborately examined.

1 Cranch, 33,  
Talbot v.  
Seaman.

§ 11. The Supreme Court of the United States, in cases of appeals and on writs of error, are limited to the statement of facts made in the court below: 2. The municipal laws of foreign countries are generally to be proved as facts: 3. Marine ordinances of foreign countries promulgated by the executive by order of Congress, may be read in the United States' courts without further authentication or proof. *Quære*, if not so promulgated.

4 Cranch,  
241, 291,  
Rose v.  
Himely; but  
3 Bin. 220.

§ 12. Every sentence of condemnation by a competent court having jurisdiction over the subject matter of its judgment, is conclusive as to the title claimed under it; but its sentence is not to be regarded, if it cannot, consistently with the law of nations, exercise the jurisdiction it has assumed: 3. The seizure of a foreign vessel not within the territorial jurisdiction, for the breach of a municipal regulation or law, is not warranted by the law of nations, and cannot give jurisdiction to the courts of the offended country; especially if the property seized be never carried within its territorial jurisdiction: 4. It is doubtful if a French court could consistently with the law of nations and the treaty, condemn American property, never carried into the dominions of France, and while lying in a port of the United States: 5. Property sold ordered to be restored, no interest allowed. In part overruled; see a. 14.

4 Cranch,  
Hudson v.  
Guestier,  
293, 297.

§ 13. But where an American vessel was seized by the French, within their territorial jurisdiction of St. Domingo, for breach of a municipal law of France, and carried into a Spanish neutral port in Cuba; held, this vessel, *while lying there*, might lawfully be condemned by a French tribunal sitting in a French port, Guadaloupe: 2. The possession of the captors in a neutral port, is the possession of their sovereign: And 3. His possession gives jurisdiction to his courts: 4. But if possession be lost by recapture, or escape, or voluntary discharge, or adversely, the courts of the captors lose their jurisdiction, which they acquired by the seizure: 5. No foreign court can question the correctness of the sentence, unless the court giving it, loses it jurisdiction by some circumstance which the law of nations can notice. This vessel

was seized in 1804, under a decree of France, and condemned in Guadeloupe. This shows our courts of law viewed St. Domingo subject to France; then as our government had not recognized the independence of St. Domingo, and supposed there might be a French law for condemning a vessel in Guadeloupe, seized in St. Domingo. (But 4 Cranch, 513, is a *quære* if the admiralty jurisdiction depends on the possession of the thing; and is a *quære* also, if the admiralty act is wholly in *rem*.) See a. 14; Ch. 224, a. 11, s. 5. Goods sold in St. Martins were libelled in Guadeloupe; and 4 Rob. 186. The seizure by the captor is his sovereign's seizure, and vests the possession in him. In *Rose v. Himely*, the *Sarah* was seized on the *high seas*, not under French municipal law, as it did not extend there, nor as prize of war.

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Art. 10.

6 Rob. 48.

§ 14. The jurisdiction of the French courts, as to seizures, is not limited to those made within two leagues of the coasts, though for violating municipal law. *Rose v. Himely*, overruled.

6 Cranch,  
281, *Hudson*  
*v. Guestier*.  
—2 Rob. 209.

§ 15. If errors appear upon the face of the report of auditors, it is not necessary to except; as it is unnecessary to state what is apparent in the case and record. If a prize be lost at sea, the prize court has jurisdiction. 4 Rob. 186.

5 Cran. 313.

§ 16. The *admiralty jurisdiction* never was any part of the Colony government, but expressly reserved to the king, as in this charter of William and Mary; he expressly reserved the power to erect and allow all admiralty courts, jurisdiction, and authority, to be exercised forever, by "commissions, to be issued under the great seal of England, or under the seal of the high admiral, or the commissioners for executing the office of high admiral of England." In this way the admiralty jurisdiction remained entire in the crown, and never vested in the Colony governments. When the American revolution commenced, this jurisdiction properly devolved on the union, as below. By the confederation, this jurisdiction was partially granted to Congress, wholly as to piracies and felonies on the seas, and by way of appeals in cases of captures, and exclusively by the Federal constitution. See this matter further examined in other places.

6 Rob. 48,  
Charter of  
William and  
Mary. 1691.

#### ART. 10. *Constitution and statutes of the United States.*

§ 1. These are the foundation of the admiralty and maritime jurisdiction in the United States, of which the foregoing cases are valuable and important interpretations, as far as they go.

Constitution of the United States, article 3, section 2. By this section, the judicial power vested in the supreme and other courts of the United States, extends to "all cases of admiralty and maritime jurisdiction." By this same section,

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gress, Sept.  
24, 1789.

the Supreme Court has only *appellate* jurisdiction in these cases, both as to law and fact, "with such exceptions, and under such regulations, as the Congress shall make;" as by the same section, "the trial of all crimes, except in cases of impeachment, shall be by jury." A jury trial must be had in all cases of crimes committed within admiralty and maritime jurisdiction; that is, upon the sea, and without the body of the county or district.

§ 2. By this act, the supreme court, circuit and district courts, were established, and their respective powers and duties designated. By the 9th section of this act, the district courts have (exclusively of the State courts) "cognizance of all crimes and offences," cognizable under Federal authority, "committed within their respective districts, or upon the high seas," where the punishment exceeds not thirty-nine stripes, a fine of one-hundred dollars, or imprisonment six months. And have also "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation, or trade of the United States, where the seizures are made on waters which are navigable from the sea by vessels of ten or more tons burden, within their respective districts, as well as upon the high seas; saving to sailors, in all cases, the right of a common law remedy, where the common law is competent to give it;" and also have "exclusive original cognizance of all seizures on land, or other waters than as aforesaid, made, and of all suits for penalties and forfeitures incurred under the laws of the United States." Also have cognizance, concurrent with the State courts, or the circuit courts, as the case may be, "of all causes where an alien sues for a tort, only in violation of the law of nations, or a treaty of the United States;" and "of all suits at common law, where the United States sue," to the amount of one hundred dollars; also have jurisdiction, exclusive of the State courts, "of all suits against consuls or vice-consuls, except for offences above the description aforesaid;" "and the trial of issues in fact, in the district courts, in all causes, except civil causes of admiralty and maritime jurisdiction, shall be by jury." This section is a very important one, and therefore cited at large, because, in general, it makes the very material and true distinctions not only between admiralty and common law jurisdictions, but also to many important purposes, between State and Federal jurisdictions. This section makes a new distinction as to navigable waters for vessels of ten tons &c.; but this distinction respects only seizures under the laws of impost, navigation, and trade, but leaves the admiralty and maritime jurisdiction, generally, to be defined and ascertained on the

principles of general law; hence the sundry cases before cited, and rules stated, apply here. The section also makes the distinctions between criminal and civil causes; between State and Federal causes, and by "saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it:" it has made a distinction between common and other law, most material; for as the party "in all cases," is entitled to his common law remedy wherever it may be had; where this can be had, no other can be safely pursued. This section makes other distinctions less important. It is easy to perceive, that in the process of time, an almost infinite number of questions may arise on these several distinctions; that cases may happen in a manner almost endless, in which the question will be; Is this case of admiralty or common law; of criminal or civil; of State or Federal jurisdiction? or, Is there in this case a common law remedy? Is the party an alien? Is the suit for a tort? Is the suit for a violation of the law of nations; or of a United States treaty? The Circuit and Supreme Courts have expressly an equitable jurisdiction, but the district courts have not; and 4 Cranch, 452, the court said, Congress "meant to discriminate between seizures on waters navigable from the sea and seizures upon land, and upon waters not navigable, and to class the former among the civil causes of admiralty and maritime jurisdiction."

§ 3. And as "the trial of issues, in fact, in the circuit courts shall in all suits, except those of equity and of admiralty and maritime jurisdiction, be by jury;" it will always be material to preserve the true distinctions between suits in equity, in which there can be no jury, (as also admiralty causes) and suits at law, in which there must be a jury.

§ 4. The 19th section of this act makes it "the duty of the circuit courts in causes in equity and of admiralty and maritime jurisdiction, to cause the facts, on which they found their sentence or decree, fully to appear on the record." In this way the best materials must be preserved for ascertaining and defining this jurisdiction. Also in section 21, allowing an appeal to the next circuit court, "from final decrees in a district court, in causes of admiralty and maritime jurisdiction," where the matter exceeds \$300 in value. Admiralty jurisdiction extends to all incidental questions arising out of a main admiralty question; so, as to freight, damages, and costs; who are captors, &c.; *Smart v. Wolf*; *Home v. Camden*; *Jennings v. Carson*; *Caux v. Eden*; *Lindo v. Rodney*; *Cabot v. Bingham*; *Talbot v. Janson &c.*

ART. 11. *Other admiralty causes decided in the United States.* 3 Dallas, 86,  
§ 1. Admiralty proceedings being *in rem*, the death of one 101,54 to 220.

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Art. 11.

1 Rob. 273.—  
2 Rob. 31.—  
Stewart, 128.  
—2 Taunton,  
7.—Several  
cases, Ch.  
224.

CH. 186. of the parties before judgment on appeal, will not abate the  
 Art. 11. suit or avoid the judgment. *What is sea or not*, as below.

§ 2. An appeal itself suspends the decree of the inferior court; but a writ of *inhibition* is necessary to bring the inferior court into contempt, in case of disobedience. The want of a *monition* to appear, is cured by actual appearance. 3 Dallas, 54, 231, 199, 285; 5 Rob. 173.

§ 3. The practice of our district courts, as courts of admiralty, is not regulated by law. A vessel libelled, is always in possession of the law.

§ 4. If the libel aver the vessel to be more than ten tons burden, and to have arrived at a certain port, from the West Indies, and that she was seized in such port, the court will consider it as sufficiently averred that such seizure was made upon waters navigable from the sea by vessels of ten or more tons burden. *Quare*, if the claimant must not answer on oath if required.

§ 5. 1. If the law, under which the sentence of condemnation in the lower court was pronounced, expire, after sentence there, and before final sentence in the appellate court, no sentence of condemnation can be pronounced but in virtue of some statute provision: 2. And in admiralty causes, an appeal wholly suspends the sentence, and the cause is to be heard in the appellate court, as if no sentence had been passed. 2 Brown's Civil Law, 437; 4 Cranch, 443.

§ 6. An instrument taken in the admiralty, though it may be void as a *stipulation*, yet it may be good as a *contract*, and an action of debt or a special assumpsit may lie upon it.

§ 7. A record transmitted with the evidence, but not with a statement of facts, the evidence cannot be viewed as a statement within section 19, of the judicial act above cited.

§ 8. In order to prove the condemnation of a vessel, it is only necessary to produce the *libel* and the *sentence* of condemnation. (The value stated in a valued policy cannot be varied by *parol* evidence.)

§ 9. The point decided was, that the British orders in council, November 11, 1807, did not prohibit a direct voyage from the United States to a *colony* of France. What a question of law &c. France and the United States were in a state of *partial war* in the year 1799; but the act of Congress of February 9, 1799, did not authorize the seizure on the high seas, of any vessel sailing from a French port.

§ 10. A nation's right and authority to seize vessels attempting an *illicit* trade, is not confined to their harbors, nor to the range of their batteries. Foreign laws must be proved like other facts, by oath, or some authority our law respects. But see *Talbot v. Seaman*.

2 Dallas, 87, 118.

4 Cranch, 2, 28, Jennings v. Carson.

4 Cranch, 443, United States v. Schr. Betsey and Charlotte.

5 Cranch, 281, Yeaton & al. v. U. States.

1 Brown's Civil Law, 495.—2 Do-mat, 686.

2 Dallas, 122. Republica v. Lacaze & al.

3 Dallas, 336, 337, Jennings's cases in Error.

6 Cranch, 206, Alexandria M. I. Com. v. Hodgson.

6 Cranch, 71, King v. Delaware In.

Com.—1 Cranch, 31.—2 Cranch, 170, 179.

2 Cranch, 187, Church v. Hubbard.—3 Johns. R. 310.

§ 11. *Injunction*. This is in the nature of a prohibition, and enjoins an officer or person not to do certain acts &c. See Ch. 225, a. 14.

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§ 12. This act provides that writs of *ne exeat* and of *injunction* may be granted by any judge of the Supreme Court, in cases where they might be granted by the Supreme or Circuit Courts, but no writs of *ne exeat* shall be granted unless a suit in equity be commenced, and proof given the deft. means to leave the United States quickly. Nor shall a writ of *injunction* be granted to stay proceedings in any court of a State, nor in any case, without reasonable previous notice to the adverse party &c.

Act of Congress, March 2, 1793, sect. 5.—4 Dallas, 1, 6.—3 Johns. R. 566, 608.

§ 13. *Notes as to admiralty and maritime jurisdiction*. In ascertaining this jurisdiction several words have long been inaccurately used, in regard to places especially. The words "high seas," have usually meant the open sea or ocean; and that part thereof which is the acknowledged high way of all nations; but Lord Hale says, "the arm of the sea is included therein; and holds that Ld. Coke's opinion to this effect is a correct one; and adds, "and by the Book of Assize, p. 93, so far as the sea flows and reflows is an arm of the sea." 1 Hale's P. C. 424. He further observes, that "for crimes committed on the high seas, the admiral, at common law, has jurisdiction, even unto death, *secundum leges maritimas*;" p. 500: that "the King's Bench, or courts of common law have not proceeded criminally in cases" of felonies or treason "committed upon the high seas:" 2 Hale's P. C. 13 to 17; and cites 26 Ed. III. rot. 51; 34 Ed. I. rot. 34; 18 Ed. II. rot. 18; 8 Ed. II. rot. 111; 18 Ed. II. rot. 15; 19 Ed. II. rot. 17; 25 Ed. III. rot. 22; 27 Ed. III. rot. 29: But says, they have exercised a concurrent jurisdiction with the admiralty in cases of felonies done upon the narrow seas or coasts, though it were high sea, because within the king's realm of England:" relies on the same authorities. Lord Hale adds, "as to crimes committed within any creek or arm of the sea, which was within the body of a county, the courts of common law only have jurisdiction;" and the admiralty none at the common law: thus far at common law in the time of the 2d and 3d Edward; (some think the admiralty jurisdiction previously was more extensive.) In their time the admiral had exclusive jurisdiction of felonies &c. committed on the high seas as far as they were the highway of all nations; and the common law courts, jurisdiction of those committed within counties exclusively; and both concurrently of those crimes committed on the narrow seas and coasts. See 1 Com. D. 369; 4 Inst. 134, 137; 2 East's C. L. 803, 804; Exton, 100. Thus stood the common law

Zouch. 92.—  
Andrews R. 231.

CH. 186. before the 13 R. II. c. 5; and 15 R. II. c. 3; and our act  
 Art. 11. of Congress below seems to have been framed on this old  
 common law, somewhat altered by statutes.

The English authorities further state that the 15 R. II. c. 3, first gave the admiral jurisdiction in any river or creek within the body of any county; and that this act extended only to the death of a man and *mayhem*, "done in great ships, being in the main streams of great rivers, only beneath the bridge nigh the sea;" and add, this is not exclusive of the common law courts, even below the first bridge. Here the word *sea* included both the narrow and high sea. 4 Inst. 135, 137; 1 Com. D. Admiralty, E. 14; Hob. 79, 80, *Palmer v. Pope*, cited a o, s. 6, 7; and Hob. 212, 213; and many cases there cited; see *Barber v. Wharton*, 2 Ld. Ray. 1452.

According to the 13 R. II. c. 5, the bodies of counties include all lands and waters within the realm of England; and the sea includes all waters without the realm; and, as above, the realm includes the narrow seas and the coasts. By this act the admiralty cannot meddle with any thing done within the realm, but only with things done on the sea.

The word *sea* is alone used in the 28 H. VIII. c. 15, which statute provides for trying crimes by the king's commission, "committed in or upon the sea, or in any other haven, river, creek, or other place where the admiral has jurisdiction." This act does not appear to have extended the sphere of his jurisdiction; but in this act the word *sea* included high and narrow seas. It seems the admiral had no criminal jurisdiction within the counties, except by the 15 R. II. c. 3; 3 Inst. 113; 1 Haw. ch. 37, s. 11; 2 East's C. L. 802, 803, 804; 2 Haw. ch. 9, s. 14; 1 Bac. Abr. 751, Courts of Adm. A.; 13 Co. 52; 12 Co. 81, Constable's case; 5 Co. 106, 107.

§ 14, February 4, 1632, an agreement was made and signed by all the judges of England, and ratified by the king in council, which was to fix the admiral's jurisdiction, and to end, if possible, the very vexatious dispute as to its extent. Article 1, "provided, if suit be commenced in the court of admiralty, upon contracts made, or things personal done, beyond the sea, or upon the sea, no prohibition is to be awarded:" so the second and third articles respect contracts before explained: article 4. "Although of some causes arising on the Thames beneath the bridge, and divers other rivers beneath the first bridge, the king's courts have cognizance, yet the admiralty hath also jurisdiction there, in the point specially mentioned in the statute, 15 Rich. II.; and also by

exposition and equity thereof, he may inquire of, and redress all annoyances and obstructions in those rivers, that are any impediment to navigation or passage to or from the sea, and no prohibition is to be granted in such cases : article 5. " If any be imprisoned, and upon *habeas corpus* brought, it be certified that any of these be the cause of his imprisonment, the party shall be remanded." London ed. of Cro. Car. A. D. 1657. The king *v.* Bruce. A. D. 1812, all the judges of England held, a murder well tried at the admiralty sessions, committed in Milford haven, in a passage about three miles wide, about seven or eight miles from the open sea, and about sixteen miles below any bridge over the river, and where the water ever was perfectly salt, and was twenty feet deep or more. In these cases the words *sea*, *high seas*, *open sea*, and *ocean*, seem to be used much in the same sense. But the word *sea*, in these statutes, does not include tide rivers, bays, basins, coves, creeks, and other arms of the sea, where its tides ebb and flow ; because they are in these statutes described by other words, as rivers, creeks, havens, &c. ; yet these cases, above cited in this chapter, make it clear these arms of the sea are viewed as parts of it, and the same as the sea itself. See Year Book, 8 Ed. IV. 19 ; Constable's case &c. Ch. 68, a. 2, s. 9, and above.

§ 15. It has been thought by some that the 7 and 8 W. III. c. 22, enlarged the admiralty jurisdiction in the British colonies ; but it will be observed this statute was enacted to prevent frauds, and to regulate abuses in the plantation trade, and admiralty courts were instituted accordingly. William, in his charter of 1691, to Massachusetts, reserved to himself, his heirs, &c. the admiralty court jurisdiction, power, and authority, no doubt as it existed in 1691 ; and, therefore, as above described, exclusive on the high seas, the common highway of nations, without the territorial line, usually cannon shot from the shores ; concurrent with the common law on the coasts between the shore and that line, and without the bodies of counties, and within them only such admiralty limited jurisdiction the said prior statutes gave, and that was the colonial view of the subject ; but his after act 7 and 8th his reign, extended the admiralty powers in the colonies very much in regard to objects, as frauds and abuses in trade, revenue, and navigation ; but the admiralty geographical sphere of action remained as before. Some have supposed the members of the convention, who formed the constitution of the United States, had in view this extended admiralty jurisdiction, when they provided the judicial power should extend " to all cases of admiralty and maritime jurisdiction." This

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CH. 186. is not probable, because this extended jurisdiction was deemed by the colonies unconstitutional. See 1st volume of the  
 Art. 11. Journals of the Old Congress, p. 47, and other authorities. It is the most natural to suppose the convention and people had in view and meant what they deemed the constitutional admiralty power and jurisdiction. The king's commission to the governor of New Hampshire, in 1766, seems to have extended to all crimes and suspected offences and contracts, even to fresh waters, and arms of rivers, &c. The colonies never admitted an admiralty jurisdiction to be legal to this extent. 1st Vol. Jour. of the Old Congress, p. 47. In 1774, congress well understood this subject.

§ 16. And see the act of Congress of 1790, ch. 9, sec. 8, which provides for the punishment of piracy and felony, "committed upon the high seas, or in any river, haven, basin, or bay out of the jurisdiction of any particular State." It will be observed, this act does not use the word *coast*, but evidently must have included the sea coasts in the words used in the act, as far as not within the bodies of counties; that is, all between the county lines and the said public highway of nations: that portion of the sea along the shore of each nation, it is allowed to appropriate to itself. In which words in the act is this portion included? One would infer in the words *high seas*, as it is difficult to see how such a large portion of the sea, and open sea, extending out several miles from any land, can properly be included in the words, *river, haven, basin, or bay*, out of the jurisdiction of any particular State. What river, haven, basin, or bay, have we out of such jurisdiction? We have seen, Ch. 186, a. 9, s. 1, the Delaware has been adjudged to be within our admiralty and maritime jurisdiction; and that Boston harbour is not within the said eighth section of the act of 1790, because within the jurisdiction of a particular State; and that section extends only to rivers &c. *without*; but might have included that harbour within the said admiralty and maritime jurisdiction; 8 Wheat. R. 436 to 491, *United States v. Bevens*, who was indicted in the Circuit Court for murder committed on board of a United States seventy-four gun ship, lying in said harbour, and who was discharged because the said court had no jurisdiction of the offence under said act, because it is the river, haven, &c. mentioned in it, that is, out of such State jurisdiction, and not the offence committed: 2. Held, in this case the said clause granting to the United States admiralty and maritime jurisdiction, does not cede the waters in which those cases may arise, or the general jurisdiction over the same: 3. But this general jurisdiction subject to this admir-

alty jurisdiction, " adheres to the territory as a portion of territory not yet given away ; and the residuary powers of legislation still remain in the State : " 4. Congress has power to provide for punishing offences committed by persons serving on board a ship of war of the United States, wherever it may be, but Congress has not exercised it in the case of a ship lying in the waters of a particular State ; the third section in said act not extending to such ship, but only to territorial objects. The act of Congress of April 30, 1790, section 12, does not extend to rivers in foreign countries, as in China, India, &c. 5 Wheat. 77 to 116, United States *v.* Wiltberger ; see 1 Azuni's M. Law, 244 &c.

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§ 17. It is obvious this eighth section of the act of 1790, was not so broad as the clause in the constitution ; and that this clause is founded on the common law and the 15 Rich. II. c. 3, with this difference, to wit, this clause is not confined to the death of a man and *mayhem* only, done in great ships, being in the main streams and great rivers only, beneath the bridge nigh the sea ; this narrow description as to crimes and place, this clause omits ; and when the statutes of Congress shall be as broad as this clause, it will be an important question what are cases of admiralty and maritime jurisdiction, as to places within State jurisdiction : many cases have already been decided, stated in this work ; especially, in this and the following chapter ; and chapters 224 and 227, as to seizures and captures. Cases of two sorts : 1. As to *place*, as the Delaware &c. : 2. As to the matter, as a *maritime* matter or not. The ninth section in the act of Congress of September 24, 1789, cited art. 10, has drawn important lines of distinction. By 15 Rich. II. c. 3, the admiral has no power in counties but as above.

§ 18. In considering State rights jurisdiction and sovereignty, it is material to inquire what sovereign powers the individual States ever had as several and distinct States, and what as one body, a nation. It is very clear there never has been in Federal America but one body, one sovereignty, in regard to peace and war ; sending and receiving ambassadors, other public ministers, and consuls ; making treaties with foreign powers, the post office, and admiralty and maritime jurisdiction : certain it is, that no Colony or State individually ever exercised any power on any of these subjects in any settled state of things. Before there was an American Congress, in 1774, the king exercised the powers of government on these subjects, not the Colonies ; and as soon as there was a Congress, and the American people assumed self government, they by common and full consent granted and

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assigned the powers of government on these subjects to Congress, even before independence was declared. In fact, the power to declare independence itself, was in Congress, understood to be by the consent of the people; the members were early elected, some by Colony assembly, some by conventions, and some by counties: no specific powers were given to them, but they were left to act as occasion required. The first maritime and prize power exercised by any Colony in the revolution, was under a resolve of Congress. See Massachusetts Laws, September 20, 1775. And from the first of the war this power was viewed as in that body; and November 25, 1775, Congress established a regular system, under which maritime captures were made; and no one could exercise or make prize of vessels or cargoes but under a commission from Congress. Under this act of Congress, the State courts for deciding on captures were generally instituted; and the act of Congress provided, "that in all cases an appeal be allowed to the Congress, or such person or persons as they shall appoint for the trial of appeals."

ART. 12. *Quo warranto, and information in the nature of.* See Ch. 143, and Ch. 184, a. 2, *Amendable.*

3 Bl. Com.  
262, 264,  
Buller's N. P.  
210.—2 Inst.  
282.—9 Co.  
28.—For  
deft's. usurp-  
ing an office  
&c. &c. 4  
Went. 18, 36,  
and pleas, 29,  
40; other ca-  
ses, 40 to 242.

§ 1. A *quo warranto* is in the nature of a writ of right for the king or public, against him who claims or usurps any office, franchise, or liberty, to inquire by what authority he supports his claim, in order to decide the right. It also lies in the case of a *non-user*, or long neglect of franchise, or mis-user or abuse of it, being a writ to command the deft. to show by what warrant he exercises such a franchise, having never had any grant of it, or having forfeited it by neglect or abuse. But for sometime this writ has been but little in use in England, and never much in use here, having given place to the *information in the nature of a quo warranto*. This information is more expeditious, and not quite so decisive; and usually applied to try merely the civil right to seize a franchise into the hands of the king or public; if such as can there rest; or merely to *oust* the wrongful possessor; the fine being merely nominal; and if one *unlawfully* holds my office or franchise in any town &c., I may, by leave of court, have this information against him; and if he be found to have usurped &c., I may have judgment of *ouster*.

4 Bac. Abr.  
83.

§ 2. In *quo warranto*, it is not a good plea to say, *non usurpavit*, and this plea is no answer; for the charge is to show by what authority &c.; but the deft's. proper plea and answer to the writ is, to show his right, by what authority or warrant he holds; nor is *not guilty* a good plea, B. N. P. 211.

3 D. & E.

300, *Rex v. Martlock*. Forms &c. Bohun, 351 to 358, and of the deft's. plea, and of the replication &c.

that the mayor should be proposed one day, and elected another; but at a meeting of the electors, where the relator was present, the mayor was proposed, and chosen the same day. Hereupon the relator moved for an information in the nature of a *quo warranto*, and a rule calling on the deft. to show cause why such an information should not go against him, for exercising said office. In answer, it was stated, that the relator and mover was at a meeting, and a party to an agreement made by the corporation, not to enforce this by-law of 1766. The court refused the information solely on the ground the party now attempting to impeach the deft's. title, concurred in an act by which some of the corporation agreed not to support this law of 1766. Rule discharged, with costs against the relator. See 9 Anne.

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Art. 12.

§ 4. This was an information in the nature of a *quo warranto*, moved for against the deft. to show by what authority he claimed to be mayor. Lord Kenyon stated, the rule to be, "that in no combination of circumstances," will the court grant "*quo warranto informations* after twenty years quiet possession;" "and all other cases, must depend on their own particular circumstances." This case was decided on affidavit. Lord Kenyon further said, though by the rules of the court, an affidavit may be received in support of the facts already alleged, yet *new matter* cannot be introduced to support the original rule. So a new affidavit offered, pending the discussion, was rejected. Application was twelve years after serving in the office.

3 D. & E.  
310, 313,  
Rex v. New  
ling.

The same rule as to twenty years *quiet possession* is laid down.

Cowp. 75.

§ 5. This information is sometimes granted where the right depends on a matter of *doubtful law*, in order to its being finally decided. The question was, if an infant, nine years old, was capable of being elected burgess of the borough of Portsmouth.

Cowp. 58,  
Rex v. Carte.

The court adopted a general rule of practice on this subject, to wit: the court will "*in future* limit their own discretion in granting applications of this nature to six years, beyond which time they would not, under any circumstances, suffer a party who had been so long in possession of his franchise, to be disturbed." Buller J. held, though one be sworn into office on a *mandamus*, yet if his title be defective, a *quo warranto* information may be immediately filed against him. The court will not grant this process where the deft. has *not used* the office as well as *claimed* it; not enough he proposed to be sworn; but actually being sworn in, is; though defective, in law.

4 D. & E.  
284, Rex v.  
Dicken.

5 D. & E. 75,  
Rex v. Whit-  
well.—B. N.  
P. 211.—4  
East, 337.

In this case, according to the rule in *Rex v. Dicken*, the

4 D. & E.  
634, Rex v.  
Peacah.

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court decided they would not grant a *quo warranto* information to impeach a *derivative* title, if the person claiming the original title has been in the undisturbed possession of his office six years.

§ 6. Thus the law seems to be settled finally as to time. Many cases were previously decided, leading to this result, not now very material; *Rex v. Pitre & al.*, 3 D. & E. 311; refused after fourteen years, *Rex v. Stacey*, 1 D. & E. 1; after sixteen years, *Winchelsea case*, 1 D. & E.; another case fourteen years, and after twenty years, *Rex v. Rogers*, 4 Burr. 2523; twenty years' rule strictly adhered to, 4 Burr. 2622; court's discretion guided by length of time and other circumstances, *Rex v. Dawes*; *Rex v. Martin*, 1 W. Bl. 634; 4 Burr. 2120; not after great length of time and uninterrupted possession, *Rex v. Stephens*, 1 Burr. 433; *Rex v. Bond*, 2 D. & E. 767.

2 D. & E.  
484, *Rex v.*  
*Francis*.

§ 7. Informations in the nature of *quo warranto* have been considered of late years merely as civil proceedings; and therefore in them *new* trials may be granted as stated in a former chapter.

B. N. P. 210.

§ 8. On a rule to show cause, the court will grant a rule to inspect books that belong to a corporation.

*Rex v. Mars-*  
*den*, 3 Burr.  
1812.

§ 9. Does not lie for encouraging or promoting the holding of a fair or market, if it do lie for actually holding one not authorized by law; see *Rex v. Mayor of Colchester*, 2 D. & E. 259. *Mandamus* to admit a recorder, refused, because there was one *de facto*, and the party had a *quo warranto* &c., though both claimed under the same election. See Ch. 186, a. 277.

#### ART. 13. *American cases.*

§ 1. The law upon this subject has been but very imperfectly settled by American decisions; no one is recollected in the Federal courts, and but few have been made in the State courts. The want of such is the less to be regretted; for it is believed there are few or no American statutes on this subject of informations, in the nature of the old writ of *quo warranto*, (though there are sundry American statutes concerning informations on the penal statutes for the recovery of statute penalties), and therefore common law principles govern mainly.

3 Mass. R.  
285, *Com-*  
*monwealth*  
*v. Athearn*.

July term, 1807, Boston, a motion was made for a rule of court against the deft., to show cause why an information in the nature of a *quo warranto*, should not be awarded against him for claiming to hold the office of town clerk of Tisbury, in Dukes county. The court granted a rule *de bene esse*, returnable the next term. The deft. (or respondent) appeared by his attorney. Held, the court would not award this pro-

cess against a town officer, who is elected for one year; but the court has no power to award costs to the deft., though claimed by him as the *prevailing* party; main reason, no remedy could be afforded before the year would be expired; the officer can be liable to a *fine* only on judgment of a motion rendered; but there can be no such judgment after the term expired. This decision is important in its effects, because a vast proportion of all the offices in the United States are *annual*.

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§ 2. See Ch. 143, a. 5, the important case of the Commonwealth v. Union Fire Marine Insurance Company.

§ 3. Teel, the relator, made a motion for an information in the nature of a *quo warranto* against Sweeting, an officer, and it appeared his office would expire before the inquiry could have any effect; information refused: 2. Held, that granting leave to file such, is a matter of discretion. The party left to his remedy &c.

2 Johns. R. 184, the people *ex relatione*, Teel v. Sweeting.

§ 4. In this case, the Kinsdale and Chatham Turnpike Corporation, opened a road through the lands of Many, and others, and made no compensation, pursuant to the direction of the statute. Many & al., the owners of the land injured, moved for an information, in the nature of a *quo warranto*, against the company; but the court refused it, and left them to their remedy in the course of common law. The public has no concern in the case.

2 Johns. R. 190, the people, *ex relatione*, Many & al. v. Kinsdale &c. Corp.

§ 5. February 10, 1813, the House of Representatives passed an order, requesting the Attorney General &c. to file an information in the nature of a *quo warranto*, to know by what authority sundry persons therein named, exercised certain offices in the county of Hampden, and among others, by what authority the deft. exercised the office of sheriff of the said county.

9 Mass. R. 531, Commonwealth v. Smith, jun.

March term, 1813, in Boston, the Attorney and Solicitor General filed an information, recited said order, and in pursuance of it gave the court to understand "that said Smith, for six months, had used and exercised, and still doth use and exercise the office of sheriff of the said county, without any warrant or lawful authority therefor;" which office he usurped &c. and prayed the advisement of the court in the premises, as to the power said order gave, and if it gave them sufficient power to prosecute &c., they then moved for this process; they doubted if impowered by the executive or legislature, to prosecute &c. The court declined to interfere with any advice on the subject, whether sufficient or not; because Smith had "a right to be heard before any such opinion be given."

§ 6. April term, 1813, Hampshire county; the Solicitor General filed an information viz.: Commonwealth v. Samuel

10 Mass. R. 290, Commonwealth v. Fowler.

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Fowler Esq. "Bè it remembered, that D. D., Solicitor General of said Commonwealth, comes into court, and brings with him into court a certain order of the House of Representatives of said Commonwealth, which is in these words, that is to say, recited the order *verbatim*, in substance as above, *mutatis mutandis*:" "Whereupon the said Solicitor General, by virtue of the power and authority of, and in compliance with the said order of the House of Representatives, and of the request therein contained, gives the said court to understand and be informed, that Samuel Fowler, of Westfield, in said county of Hampden, Esquire, for the space of six months, now last past, hath used and exercised, and still doth use and exercise, the office of Judge of Probate &c. in said county of Hampden, without any warrant or lawful authority therefor; which said office, and the powers, authorities, and emoluments to that office appertaining, the said Samuel Fowler, during all the time aforesaid, hath usurped, and still doth usurp, upon the government of the said Commonwealth, to the great damage and prejudice of the lawful authority thereof; whereupon the said Solicitor General prays the advisement of the court here in the premises, and for due process of law against the said Samuel Fowler, in this behalf, to be made, to answer to the said Commonwealth, *by what warrant* he claims to have, use, exercise, and enjoy the aforesaid office."

Summons issued for his appearance at September term, in Hampshire county. He appeared by his attorney, and moved to quash the information, on the ground it had not been duly filed in court, because not filed by the Solicitor General *ex officio*, nor by order of the legislature. Held by the court, it was filed *ex officio*, and the reciting of said order had no effect; held also, where the legislature has created a new county, and in the act provided it should not take effect until a future day mentioned, an appointment by the executive of the Commonwealth to an office, for such county, before such day, was void. Also, held, that the Attorney General, or Solicitor General, had power, *ex officio*, to file such informations, and without any order, and the recital of the order was merely *surplusage*: otherwise as to an inquest of office to cause the State to be *reseized* of land. So *ex officio* may file an information for the purpose of dissolving a corporation, whether created by charter under the seal of the Commonwealth, or by a statute of the legislature. The deft. put in a special plea, stating his authority, and his appointment by the governor, May 20, 1812; his commission brought into court &c.; his oath &c.; and traversed he usurped upon the said Commonwealth, as in, and by the said information above, is supposed"—*hoc paratus* &c. After oyer of said commission, and

certificate, the Solicitor General demurred generally and joined. The act creating the county of Hampden, was passed February 25, 1812, to take effect, and be in force from and after the first day of August, 1812. So no county of Hampden existed, as was argued, when the commission was given &c. Decision as above. The point seems very clear; but the court also held, that "so long as the persons were *de facto* officers, under such appointment their official acts were lawful, except only in cases of direct injuries to their fellow citizens; an exception which cannot apply to one acting in the office of judge of probate." The legality of such acts is questionable; and *quære*, if the principle on which official power *de facto* rests, was not misunderstood; nor was this a point before the court. The court also said, "as the Supreme Judicial Court, we must have authority wherever a wrong takes place, to redress it, either by appeal or by process originating here." The position here laid down is certainly too broad; there are scores of cases, in which "a wrong takes place," in which this court cannot interfere by appeal or original process; nor was this a point before the court.

In applying the English authorities, cited on the subject of *quo warranto* informations, it will be necessary to bear in mind that the statutes of 4 and 5 W. & M., c. 12, and 9 Anne, c. 20, are somewhat material; by them a responsible relator, informer, or prosecutor, is created, who must recognize to prosecute with effect, and pay costs, if judgment be for the deft., and if against him, he, by these acts, pays costs; nor, since these acts, made to restrain old abuses practised by informers, can any such information go on, in which is such responsible relator, but by leave of the court. From the few cases found in the New York reports, it rather appears that these statutes are used in practice in that state, at least that the principles of them have been adopted there; if so, the said English cases will apply there; but if they have not been adopted in Massachusetts, and no evidence is found to show they have been, these *quo warranto* informations are wholly at common law, and not restrained by the salutary provisions of these two statutes, but are at the discretion of the Attorney or Solicitor General; and though Athearn in the above case, was the deft. and prevailing party, it will be observed, the court could not allow him costs. Yet as these statutes are in amelioration of the common law, and to remedy abuses that law did not prevent, it is in conformity to the general principle we have adhered to, to decide that these acts have been adopted here.

*Form of the judgment.* "It is considered by the court here, 11 Mass. R. that the said Samuel Fowler, Esq. do not in any manner in- 339.

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termmeddle or concern himself in or about the holding of, or exercising the said office of judge of probate of wills, and granting administration on the estates of persons deceased, in the said county of Hampden, in the said information specified, in virtue of the supposed commission, by him mentioned in his plea in bar aforesaid; but that the said Samuel Fowler, Esq. be, absolutely forejudged and excluded from holding or exercising the same office, and that the said Commonwealth recover costs taxed at ——" &c.

11 Mass. R.  
74, Com-  
monwealth  
v. Smead.

§ 7. An information *quo warranto* may be filed in any county, the process issuing thereon being made returnable in the property county.

2 Stra. 1213,  
Rex v.  
Goudge.

ART. 14. *Further English cases*, in which the process lies, and the principles of which are of use in our practice.

§ 1. Lies against a constable to show by what authority he exercises the office of constable in a particular parish; and the court said, such informations had been often granted to try the right.

2 Stra. 1161,  
Rex v. Rey-  
nell.

§ 2. So it lies against one for claiming an exclusive ferry over a river, but not for taking money of passengers, which is not setting up an exclusive right. So a fair, market, or toll; 6 Com. D. 157.

6 D. & E.  
560, Rex v.  
Richmond.

§ 3. So it lies against one in order to try whether his residence in a borough, previous to an election, was *bona fide* or not; one of the qualifications for which, was residence.

6 East, 359,  
Rex v. Bab-  
cock & al.

§ 4. A statute created the office of commissioners to pave a town, and impowered them to tax the inhabitants. Held, this information lay against several for exercising this office.

2 Stra. 636,  
Rex v. Boyles.

§ 5. So it lies in respect of any office which concerns the public. The deft. claimed to be bailiff of the ville of Southwold, called an ancient town; for setting up this office was "a usurpation upon the crown."

1 Stra. 299,  
Rex v.  
Nicholson &  
al.

"6. A private act of Parliament enlarged and regulated the port of Whitehaven, and several persons were appointed trustees, and impowered to elect others, on vacancies by death or otherwise. Def'ts. assumed to act as trustees, though not elected as the act directed. This information granted against them, though this power usurped, was no prior franchise of the crown. So it lies for a claim of exemptions. Co. Ent. 528 a.; 3 D. & E. 529 n.

6 Com. D.  
157.

§ 7. So it lies against a person claiming a right to vote by virtue of a *burghage* tenement. So for wreck of the sea.

3 D. & E.  
575, Rex v.  
Smith; and  
596.

§ 8. So it lies against one as mayor, for not having taken the sacrament in the proper time, though the relators concurred in the election; "because that defect is a *latent* one, arising from the omission of an act positively required by the legislature;" (13 Car. 2, H. II. c. 1); and the court for such omis-

sion granted this process, at the request of a mere *stranger*, because it concerns the interest of the whole nation; but he ought to make out a strong case; and if the affidavit to support the rule for such information, omit a *material* fact, stated in the affidavit filed by the *deft.*, this may be read by the prosecutor in support of his rule.

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Rex v.  
Brown, 1  
East, 46 n.

§ 9. So it lies against a returning officer of a borough, on affidavit, as last mentioned; though, generally, this information lies not to try the title of electors, by attacking the elected's title; but it does lie where there is no way to try their title in the first instance. A *portreeve* is a *public* officer of the peace. So this process lies to try a coroner's election and title, and in trying it, the titles of the freeholders of the county electing him, shall be tried; for no such information lies directly against them to try their rights or titles to vote.

3 D. & E.  
506, 598, Rex  
v. Mein.—  
Cowp. 507.—  
Dougl. 374.

§ 10. The *deft.* exercised the office of alderman of the borough of East Ritsford. The relators opposed his election, as such, but made no opposition to his election to the principal office of magistracy, to which that of alderman was a necessary qualification; they also afterwards attended, and concurred in acts in corporate meetings, in which he presided &c. Held, on their relation, this process lay, and such acts were no objection; for said the court, there must be magistrates; the powers of government cannot stand still till the validity of a former disputed election is ascertained, "the necessity of a government *de facto* is recognised" by 11 H. VII. c. 1, even as to the crown &c.

1 East, 38,  
Rex v. Clark.

§ 11. So this information lies where enough appears by the affidavits to draw into question the merits of an election to a corporate office, though the fact of the *deft.*'s usurpation appear no otherwise than by the deponent's swearing to their *information and belief*, that the *deft.* was admitted a freeman, and sworn, and enrolled accordingly,—*the deft. not denying the fact when called on by the rule to show cause.* The *deft.* claimed to be one of the *freemen* of the city of Litchfield; and it was admitted enough appeared in the depositions to put the merits of the election in issue.

2 East, 177,  
Rex v. Har-  
wood.

§ 12. So it lies, though operating in effect to dissolve the corporation; and it is no objection to the relator that he attended the meeting at which the mayor was elected, whose election he impeaches on the ground the corporation is dissolved by the loss of an integral part, and that he voted for another candidate, and afterwards attended other corporate meetings at which such mayor presided; for he has not contributed to this dissolution &c.

3 East, 213,  
Rex v. Morris  
and Stewart.

§ 13. So this information lies on the application of one relator, who is a proper one, though he join in it with others, on whose application alone it would not be granted.

4 D. & E.  
213, Rex v.  
Symmons.

- CH. 186. By this act, all informations of this sort must be filed by  
 Art. 15. *leave of the court*, and the prosecutor recognize. And by 9  
 Anne, if any one illegally intrude into, or hold any office or  
 franchise mentioned in the act, the proper officer of the court,  
 by its leave, may exhibit this information at the relation of  
 any person mentioned in it as the relator; and one may be  
 filed against several persons, who may be joined, and the *act*  
*gives costs to the relator and deft.* It is not understood these  
 two acts have been adopted in this State; but it is to be ob-  
 served, that these acts did not alter the court's power for  
 granting informations, but only regulates their proceedings in  
 certain cases relating to corporations, and restrained inform-  
 ers to remedy abuses.
- B. N. P. 211. If an information at common law, there is no relator, nor  
 —3 Bac. 211. costs, but only a *capitur pro fine*. A *quo warranto* information  
 by the Attorney General, is within said 4 and 5 of W. & M.
- ART. 15. *Further English cases in which this process lies*  
*not.*
- 2 Stra. 819, § 1. Lies not for a forfeiture of a recorder's place by non-  
 Lord Bruce's attendance. *Per Curiam*, if an actual forfeiture, he is out,  
 case. and you must choose another; if not, it is but a misdemean-  
 our, and a *quo warranto* lies not; and there is a power of  
 amotion in the corporation.
- 1 Stra 637, § 2. None lies for an act of a private nature, as erecting a  
 Rex v. warren &c. 2 Ld. Raym. 1409.  
 Lowther.
- 2 Burr. 869, § 3. Nor does it lie against a whole corporation, as a body,  
 Rex v. Corp. at the relation of a private person, in the name of the clerk  
 of Caermarthen.—Same of the crown, though leave be asked of the court: admitted,  
 case, 1 W. none has been against a corporation, *as such*, for an usurpa-  
 Bl. 187. tion upon the crown, but by the Attorney General, in his  
 name and in behalf of the crown; but the motion was allow-  
 ed for a rule against several individuals, to shew "by what  
 authority they respectively claimed to exercise their particu-  
 lar franchises.
- 3 Burr. 1616. § 4. Lies not against a steward of a corporation for acting  
 as a capital burgess.
- 1 D. & E. 4, n. Lies not after a mayor is dead to inquire into his eligibili-  
 ty, but only of the fact, if mayor or not; and if one in fact,  
 it was to be taken, he was regularly such: per Blackstone,  
 J. Nor does it lie for the office of church-warden; nor  
 Stra. 1196.— when the only acting is voting for a member of parliament.  
 Stra. 547.—4 To exercise the office of church-warden, is no usurpation up-  
 D. & E. 381. on the crown.
- 4 D. & E. § 5. Nor does it lie on a question as to the validity of an  
 240, n. election to a vacant fellowship made by the fellows of a  
 Rex v. college, disputed by the master; but the remedy may be by  
 Gregory. *mandamus*, or by an action brought by the fellow appointed  
 by the master to try his right.

§ 6. Nor does it lie where a corporation is dissolved, and no corporate body existed in fact at the time, against an individual for an impertinent claim to be returning officer at an election of members of parliament, by virtue of his having been elected an alderman while the corporation existed in fact, there being no civil right in controversy, but it being rather the ground of a proceeding *in poenam* by the attorney-general.

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3 East, 119,  
Rex v.  
Saunders.

§ 7. So it lies not on the ground of an election alone in dispute, when the deft. was elected, and this ground answered in shewing cause against a rule to try another incidental and secondary question, as to whether there was a sufficient interval of time allowed between the nomination and election of the deft., no person's right having been set aside by means of such acceleration of the election, if it were accelerated.

4 East, 327,  
Rex v. Os-  
bourne.

§ 8. Nor does it lie for one corporator against another, for a defect of title, which equally applies to his own, or to the title of those under whom he claims.

6 D. & E.  
503, Rex v.  
Cudlip.

§ 9. The statute that created the corporation directed a registrar to be appointed &c., and other officers, at their pleasure. His duty was to register titles within the Level, and he was sworn. Held, this information lay not against him, he being a mere servant of the corporation, and his office not affecting any franchise or other authority held under the crown.

6 East, 356,  
Rex v. Corp.  
of the Bed-  
ford Level.

ART. 16. *Further modes of proceeding in quo warranto informations.*

§ 1. Several cases have been already stated to this purpose, English and American. A few may be added.

§ 2. Since the statute of Anne, the English courts do not proceed in these cases until the informer gives the proper recognizance. The defts. may be fined if guilty, and the franchise seized to the king.

Salk. 374.—1  
L. Ray. 426.  
—4 Burr.  
2143, Rex v.  
Leigh, mayor  
of Yarmouth.

If the deft. fail in this process in the title he sets up, judgment must be for the crown; as where the deft. claimed the office of mayor of Yarmouth under two titles; one *prescription*, and one a *charter*; but by his plea he put it only on the first. Issue was found against him: motion in arrest of judgment. Held, he could not resort to the charter after so pleading, as he had denied it. *Curia*, in civil actions, if the plt. has no cause of action he cannot have judgment; but this manner of proceeding is different; "for if the deft. has usurped the franchise without a title, the king must have judgment; the deft. therefore, is obliged to shew a title, and the king has no need to traverse but the title set up. If any one material issue is found for the crown, the crown must

CH. 186. have judgment." In this process the deft. must shew a good  
 Art. 16. title, and if he fails in it, or in any chain of it, judgment is  
 against him.

4 Burr. 2147,  
 Rex v.  
 Blanchford.

§ 3. But if before trial the deft. finds he has pitched on the weaker defence, he may, on terms, quit it, and insist on the stronger.

—4 Burr.  
 1297, Rex v.  
 Edgar.—Rex  
 v. Brucknell.

§ 4. A *quo warranto* information cannot be quashed on motion, though both parties consent: were cross informations against two common-council men of Shewsbury: so held; but on motion to discharge recognizances on both sides, allowed by consent on both sides.

1 W. Bl. 93,  
 Rex v. Wil-  
 liams.

Judgment of ouster, though the usurpation was not continued till the trial. The offence was unlawfully holding a court in a corporation of Denbigh. Judgment was *quod capiatur*, and he ousted from holding the same in future: not alleged he continued to usurp. Judgment of ouster given lest he repeat the act. Reversed as to costs, and affirmed as to the *capiat*ur and *ouster*.

2 East, 75,  
 Rex v. Clarke  
 —See, Rex v.  
 Biddle, post.

Judgment of ouster of office, he cannot in a second information for exercising the same office, shew he was duly elected before such first information, and that he was sworn in on a peremptory *mandamus*; but it seems if the first election were valid and only the first swearing irregular, the first judgment should not have been an absolute judgment of ouster; but a judgment of *capiat*ur *pro fine* only, for the temporary usurpation, or a judgment of *ouster quousque* &c. Deft. pleaded his title specially. Replication stated the former information and judgment of *ouster*; and alleged no appointment &c. since. Rejoinder, election, and after said judgment was sworn in on *mandamus* &c. General demurrer. Judgment as above; and held, also, the absolute judgment of *ouster*, being that he (the party) be excluded from ever exercising or using the office for the future, it actually concluded him from claiming the office, but under a new election or appointment. A *mandamus* to swear in, confers no title.

4 D. & E. 276,  
 Rex v. Brown.

§ 5. Where an information *quo warranto* is filed at the suit of a private person, and a proper case has been laid before the court to induce them to allow it, "they have never exercised any controul over it afterwards as to the manner in which it shall be conducted;" nor has the court "ever exercised the same discretion in these cases as the attorney does in the case of an information filed by him *ex officio*."

4 D. & E.  
 419, Rex v.  
 T. Knight,  
 425.

§ 6. The deft. in this process, pleaded title under a custom; for "the mayor and burgesses of Newcastle and Lyme, in common council assembled, under their various names of incorporation, from time immemorial, till the grant of letters patent by queen Elizabeth; and for the mayor, bailiffs, and

capital burgesses, in common-council assembled since that time, to admit every person of the age of twenty-one, whom they choose. After a verdict for the deft., establishing this custom," court held it well pleaded, as it appeared always to have been exercised by the same body, to wit, the common-council, though constituted of different persons at different times.

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§ 7. From the nature of the charge in these cases of *quo warranto* informations, the deft. must either justify or disclaim; and as the judgment is, he be fined *pro usu et usurpatione*, a user as well as claim must be proved; but though an information will not lie for a *non user*, yet it will be a good cause of amotion.

Bul. N. P.  
211, Rex v.  
Ponsonby.

§ 8. If a usurpation be by a corporation, process shall be against them by their corporate name; but if it be for usurping to be a corporation, it shall be against the natural persons who usurp, or by a name that comprehends them; but an information lies not on the 9th Anne, c. 20, against a corporation as a body, but only against individuals usurping franchises in corporations: against a corporation is always by the Attorney General; and if for using a franchise by a corporation, it ought to be against the corporation.

6 Com. D.  
158, 160.—2  
Rol. 115.—2  
Burr. 689.

§ 9. The deft's. plea may be as general as the information; as if a *quo warranto* be for using a market, toll, &c. it is enough to make title to either, without saying how much the toll was.

Pal. 81.

§ 10. So if he claim franchises by prescription and others by charter, he may conclude so *warranto utitur* generally; for his plea shall be taken distributively.

Mod. 398.

§ 11. If a franchise or liberty which may subsist in the crown be forfeited, judgment for seizing or ousting is proper. If created by the king, seizing is most proper.

6 Com. 168.  
—1 Salk. 374.

§ 12. If judgment be for the seizure of his franchise into the king's hands, all franchises incident or subordinate, granted by the same charter, are also forfeited.

Pal. 82.

§ 13. But if the Attorney General confess the deft's. plea, there shall be judgment for the allowance of the franchises.

Co. Ent. 635,  
637, 649, 664.

§ 14. It is said, the confession of the Attorney General does not bind the king where the matter is public; nor him or the court in point of law, but only as to fact.

6 Com. D.  
163, 164—1  
Rol. 112.

§ 15. If the deft. confess usurpation for part of the time only, and from thence insists on an election, there cannot be judgment of *ouster*, but only *capiatur pro fine*; see *Rex v. Clark* above; and the court said, this was the proper punishment for acting before elected, but that it would be hard for this to do away a proper subsequent election.

Stra. 953, Rex  
v. Biddle and  
Taylor.

§ 16. If a mayor suffer judgment to go against him by

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1 Sid. 86.—1

Roll. 112.—

Hard. 129.—6

Com. D. 164.

§ 17. Judgment in this process is final generally; for it is in the nature of a writ of right: final as to the king: so on confession of the Attorney General as to matter of fact; for as to the fact it is conclusive, though not as to the law.

Co. Ent. 539,  
540.

§ 18. After judgment of seizure of liberties into the king's hands, a writ of seizure issues to the sheriff, and he returns a seizure.

4 Mod. 58,  
Smith's case.

§ 19. Case of the city of London, its liberties seized on *quo warranto*. One brought a *mandamus* to be restored to the place of an alderman: held, the corporation was not dissolved. *Curia*, "a corporation may be dissolved; for it is created upon a trust; and if that be broken, it is forfeited; but a judgment of seizure cannot be proper in such cases, for, if it be dissolved, to what purpose should it be seized? Therefore, by this judgment in the *quo warranto*, the corporation was not dissolved; for it doth neither extinguish nor dissolve the body politic."

15 Mass. R.  
125.

§ 20. A corporation having the grant of a lottery for building a bridge, appointed managers of it: held, that a *quo warranto* information did not lie against them; for the managers were mere servants of the corporation, and did not claim to hold or exercise any public office.

5 Wheaton,  
291, Wallace  
v. Anderson.

§ 21. Held, that an information for a *quo warranto*, to try the title to an office, can be maintained but on the motion of the government; and that the consent of parties cannot give jurisdiction to the court.

#### ART. 17. *Protections.*

§ 1. Writs of, are given on many occasions to foreign ministers, to merchants, to aliens, and to others, and, especially in judicial proceedings, to parties and witnesses. There are several forms of them in 5 Woods' Conveyances, 734 &c.; also there are several forms in the Register, 280 to 283; as one granted on petition to the king, 280; one to the merchants, 281; new form for one year, 282. See Ch. 65, a. 4.

§ 2. This writ is general, to protect a man and his property, servants &c.; or special, to protect only his person; sometimes indefinitely, and sometimes for a limited period, and often while going to, at, and returning from a court.

§ 3. The general writ of protection in the Register is,—*Rex* to all and singular, sheriffs, mayors, bailiffs, constables, ministers, as also all others, our faithful subjects, greeting: Know ye, that we have taken into our special protection and defence, J. B., his men, lands, affairs, rents, and all his possessions, and also his goods and chattels whatever; and so we

command you to keep, protect, and defend him, the said B., his men, &c. as above; not bringing on them, or, as far as in you lies, not permitting to be brought on them, any injury, damage, violence, impediment, or wrong, whatever; and if any wrong or injury be done, you cause it to be corrected and repaired without delay. In testimony &c.

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§ 4. It is generally best to express in the protection the reason of its being granted. From this general form, one may be easily framed for the protection of the *person only*, or for *special purposes*, and a *specified time only*.

§ 5. The uses of writs of protection in this country are mainly in judicial proceedings, in conducting suits, so properly a part of pleadings. These are common; but often sued out where there is no occasion for so doing, as it has been decided that "a juror, or other person, whose duty brings him to court, whether as a party or witness," is exempt from arrest; and therefore if "arrested while attending the court, or *eundo* or *redeundo*, the court, upon motion, will take order for his discharge;" and that "a writ of protection will not protect one who is not lawfully entitled to it, and is of no other use to one who is so entitled, but as *prima facie* evidence to the officer who is about to arrest him."

3 M. R. 288.

§ 6. A writ of *habeas corpus* issued on M'Neel's motion; he was party to an action pending in court, referred to the decision of the court, on a case stated; and had been taken in execution in a civil action. Held, he had a right to be attending when his action was discussed; and he was discharged, though urged that his attendance could be of no service, as he could not aid his counsel in discussing a mere matter of law.

6 Mass. R.  
246, M'Neil's  
case.

§ 7. Held, in this case, if one attend the court as a witness, without being summoned, he is not protected from arrests, although he has a writ of protection.

6 Mass. R.  
264, M'Neil's  
case.

§ 8. This writ of protection is issued by the Federal and State courts, on the principles of the common law, and it is necessarily limited to judicial proceedings, and to those necessarily concerned in them, and to to their persons, and so long only as their attendance is necessary, including going to and returning from court, or the place where, by law, such attendance must be.

§ 9. In England, the king has ever had power, by his protection, to exempt; in certain cases, not only persons, but their estates and men, from arrest; and such protection has been pleadable in *abatement*, as an immunity from actions, and the ground of it, the party's being in the king's service, especially abroad, or when one is indebted to him, who is to be paid before subjects; but it was not allowable in all cases.

1 Com. D. 31.  
—Co. L. 132.

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§ 10. There is no such power in any executive officer in the United States, except when expressly granted by statute law. This has never been done, as applicable to individual cases, as the king there has the power. Here, it is not consistent with the genius and principles of our government for any statute protection of this sort to be granted to individuals by name, but only to descriptions of persons generally; and whenever it has been done, the statute itself has usually been the protection pleadable in the courts of law, without any writ of protection being issued.

ART. 18. *The manner of pleading a safe conduct.* See Ch. 131, a. 7, s. 2.

Act of Congress,  
April 30, 1790.

§ 1. Section 28 of this act, provides "that if any person shall violate any *safe conduct* or *passport*, duly obtained and issued under the authority of the United States," he shall be imprisoned, not exceeding three years, and fined at the discretion of the court. The same if any person "shall assault, strike, wound, or imprison, or in any other manner infract the law of nations, by offering violence to the person of an *ambassador* or other public minister."

1 Bl. Com.  
259, 260.

Puffendorff's  
Law of Nations,  
r. 63,  
c. 3, s. 9.

C. & P. Laws,  
191.

§ 2. With regard to citizens or subjects, the laws of the land are usually the *passports* or *safe conduct*. These in form never can be wanted, but for aliens, except in some very special cases. In England the granting of *safe conducts* and *passports* has ever been a part of the prerogative of the crown, under very ancient statutes, without which, by the law of nations, no member of one society has a right to intrude into another." And it is altogether in the power of all States to regulate the admission of strangers into them, as they may think safe and convenient, except such as are driven on their coasts of necessity; the humane and liberal laws on these subjects, anciently made in England, were early adopted, and liberally practised upon, in the colonies; and as early as 1650, in Massachusetts, the legislature provided for special courts to expedite justice in the cases of strangers; and still earlier (1641) the Colony made provision for succouring strangers, or people of other nations, driven to this country by oppression, famine, &c., and for administering to them equal justice. But to prevent any abuse of this liberal privilege, the same laws also made provision for bringing them, on their arrival, before the governor, deputy governor, or two other magistrates, to give an account of their coming; and the governor &c. had power to take order concerning them, as he &c. thought best. This power obviously involved the power to permit them to remain here, to pass to different places, and to send them away; and of course involved the power of giving *passports* and *safe conducts*.

§ 3. In the *royal* provinces, the power to give them was a part of the royal prerogative, and exercised by the king's governors; but usually so little difference was made between strangers and others, that scarcely any practice in the colonies or provinces is to be found on the subject; but no subject of a nation at war could legally come into, pass, or reside, in the colonies any more than into or in the parent state, without letters of *safe conduct*. But this law was never strictly executed in the colonies, except in regard to such persons, and especially Frenchmen, as were suspected of hostile designs. In more modern times, passports have been given not only by sovereign princes, but by their ministers and military commanders; and it was understood that the British general in America, in the revolutionary war, had this power; and therefore Congress, January 13, 1778, directed general Washington to apply to general Howe for proper *passports* for transporting provisions by water, for the support and subsistence of Burgoyne's army, here prisoners of war. On the side of America, *passports* and *safe conducts* were granted sometimes by Congress, as in May, 1778, to Mrs. Provost, then at Augustine, to return to Europe; and sometimes by our commanders of armies, as in Sir Guy Carleton's case &c. in May, 1782. In one instance, in the revolutionary war, Congress granted *passports and safe conducts to their own citizens*, to remove their property or effects from the British dominions into the United States; these were necessary to make the removal lawful, as it respected our laws. In all such cases where it is not lawful, without such *passports or safe conducts*, for an alien to come into, or pass in this country, or for our citizens to have intercourse with an enemy, these passports make the acts lawful and justifiable; and if any such be prosecuted for doing the acts, their only defence is their letters of *safe conduct*, and these, if pursued, are a good defence, when properly pleaded and shown.

§ 4. In the United States, there is a *safe conduct*, tacitly given to all persons not at war; and the president by act of Congress, may give letters of safe conduct to those at war.

In the Register is an ancient writ directed by the king to all officers and subjects, reciting he has taken such a one, his servants, and property, into his protection, defence, and sure and safe keeping, for such a time, to go and come &c. and commands them to defend and protect him accordingly.

§ 5. This act provided for *passports* for American vessels, to be prepared by the secretary of state in point of form, and approved by the president.

§ 6. All breaches of *passports or safe conduct on the high*

CH. 186.

Art. 18.

7 Vol. Jour.  
Congress, p.  
70.

Register 25.

Act Cong.  
June, 1796.

CH. 187. seas are within the admiralty jurisdiction of the United States courts.  
 Art. 1.

§ 7. And whenever a party justifies his conduct or acts done by him, by virtue of a *passport* or *letter of safe conduct*, he justifies by force of a license given him, grounded on public law, and not by force of a private license, given him by the other party. This *safe conduct* or *passport* is in fact a *license* to him to whom given to do an act, and makes it lawful, which would be unlawful in itself, and without this *letter of safe conduct*. This, then, if used by the deft. in his defence and justification, must be specially pleaded, or may be in evidence as other licenses may, that is, according to the state of the pleadings, and the nature of the fact, whether criminal or civil.

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## CHAPTER CLXXXVII.

### COURTS.

#### ART. 1. Courts.

§ 1. In every State in the Union there are two descriptions of courts, in which causes civil and criminal are decided and disposed of: the courts of the United States, sitting in each State and Territory, and at the seat of government; and the courts of the several States: none of these courts are by prescription, but all of them are constituted and established, and empowered to sit, act, and decide by constitutions and statutes, by which their powers and jurisdictions are generally defined; but pleas and proceedings in them are partly by these constitutions and statutes, and partly by the common law. A fair view of these pleas and proceedings will afford a pretty correct perception how far our courts proceed according to the rules of the common law and English statutes; and how far by constitutions and our statutes, usages, and rules of practice, here originally made and established; as these courts are very numerous, have been, and are established, and regulated, by a vast number of charters, constitutions, and statutes, continually varying in a young, free, and growing country, it would be as useless almost, as tedious, to attempt to consider them minutely, or even in detail. Hence, nothing more will here be attempted, than to give a

very concise view of the outlines of their powers and duties, and of the first principles of their organization. CH. 137.  
Art. 1.

§ 2. What is a court, as also a court of record. See Ch. 137, a. 3. What belongs to the judge, and what to the jury to decide; and what is a court of record, on whose proceedings a writ of error lies; see the same chapter, in which this writ is considered.

§ 3. In England the king may appoint as many courts as he pleases, to proceed according to the general law. A power to fine, constitutes a court of record, and only such court can fine, (except for contempts in the face of the court.) The proceedings of a court of record are triable only by inspection of the record, as to the fact thereof having existed; they are removeable by writ of error after judgment rendered, and by *certiorari* before. They can protect and discharge suitors and witnesses from arrests in going to, and returning from court, and attending at them. Each justice of the peace, acting separately, is a judge of record; and so is the sessions a court of record. A court not of record cannot try a trespass *vi et armis*, because it cannot assess a fine. Its proceedings are tried, as to the truth of their existence, like other matters of fact, by a jury: are removeable by writ of false judgment; not by writ of error or *certiorari*. 1 Woodeson, 97 to 110.

§ 4. Wherever there is a power in a court, *de novo* erected by statute, to convict and fine, or imprison, there is a court of record; but error does not lie if the mode of proceeding be unknown to the common law, though *certiorari* does. 3 Bl. Com. 25.—12 Mod. 388 &c —8 Co. 38.—See Error, Ch. 137.—Salk. 200.

§ 5. "The Supreme courts of common law occasionally, and in certain cases, pay a regard to, and govern themselves by the law of nations; and particularly mercantile customs, which are a part of it; and both are said to be a part of the law of England, being adopted in matters pertinent to them." So both are a part of our law. 1 Woodeson, 126.

Admiralty courts pay special regard to the civil law; the maritime customs of civilized nations; the laws of Oleron; customs of the British admiralty, and acts of parliament; but the admiralty court is not a court of record. 1 Woodeson, 133.

§ 6. By the civil law, is "meant, usually, the civil or municipal law of the Roman empire, as comprised in the Institutes, the Code, and the Digests of the emperor Justinian, and the Novel Constitutions of himself and some of his successors." These Roman laws are, first, the constitutions of the kings: 2. The twelve tables of the decemvirs: 3. The statutes made by the senate and people: 4. The edicts of the prætors: 5. The opinions of learned authorized lawyers: and 6. The imperial decrees or constitutions of succeeding 1 Bl. Com. 80.—Also, Cooper's Justinian, 8 to 11, he varies a little from Blackstone.

CH. 187.  
Art. 2.



emperors. The present body of civil law was compiled about A. D. 553. The Institutes in four books, contain the first principles of the Roman common law; the Digests (or Pandects) in fifty books, the opinions of eminent lawyers; the New Code, a collection of imperial constitutions; the novel constitutions and additional code. The laws were lost many centuries, and finally the Digests were found at Amalfi, in Italy, about A. D. 1130. See 3 Com. D. 54, 64; 2 Com. D. 158, 159: and the Code was found at Ravenna.

1 Bl. Com.  
82.

§ 7. The *Canon law*, by which some courts in England are governed, is a body of Roman ecclesiastical law, relative to such matters as the church has, or pretends to have, the proper jurisdiction over. It is composed, 1st, Of the opinions of the ancient Latin fathers: 2. The decrees of general councils: 3. The decretal epistles and *bulls* of the Holy See, collected by one Gratian, about 1151, and subsequent ones collected by others; to these, in force in popish countries, may be added, the legatine and provincial constitutions adapted to the church in England.

ART. 2. *Supreme Court of the United States.*

§ 1. Though instituted at a late period, this is decidedly the highest court in the nation; and though the causes of which it has cognizance are not numerous, they are in general of the highest importance.

Constitution  
of the United  
States.—Art.  
3, s. 1 &c.

§ 2. By this constitution, “the judicial powers of the United States,” is vested in this court, “and in such inferior courts as the Congress may from time to time ordain and establish.” The judges of all of them hold their offices during good behaviour; and at stated times, receive for their services a compensation that cannot be diminished during their continuance in office.

§ 3. This judicial power extends, “to all cases, in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to all controversies to which the United States shall be a party; to controversies between two or more states; between a state and citizens of another state; between citizens of different states; between citizens of the same state, claiming lands under grants of different states; and between a state, or the citizens thereof, and foreign states, citizens or subjects.” “In all cases affecting ambassadors, other public ministers, and consuls, and those in which a state,” is a party, this Supreme Court has original jurisdiction, and in all other, the said cases, it has appellate jurisdiction, “both as to law and fact, with such exceptions and

under such regulations as the Congress shall make." The trial of all crimes except in cases of impeachment, is by jury, and in the state in which committed; but if not committed in any state, the trial of it is where Congress by law directs. And by the amendments of this constitution, in all capital cases, the accusation is by indictment found by a grand jury, and in all suits at common law, where the value in dispute exceeds \$20, the right of trial by jury is preserved; "and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law." This last clause seems to exclude, in such a manner, that Congress cannot enact otherwise, a trial, or re-examination, of a fact, in a writ of review; as this is unknown to the common law. In this clause the framers of this constitution appear to have been over cautious; no sound reason is perceived, or has been stated, to shew why all facts tried by a jury, shall be so absolutely re-examined according to the rule of the common law, that no law can be enacted, even by Congress, to institute any other mode of re-examination in such cases. The judicial act of Congress must be restrained by the constitution; as in ejectment between two citizens of Maryland, for land there, and the deft. sets up a title under a British subject, and alleged it is protected by treaty, and the State court decided against it. Held, the Supreme Court of the United States has no jurisdiction in the case, because none by the constitution. 5 Cranch, 344, *Owings v. Norwood*.

CH. 187.  
Art. 2.



By the first section of this act, the Supreme Court is established, to consist of a chief-justice and five associate justices; any four of them a quorum, and annually hold their terms at the seat of government, the first Monday in February and August. By section six, one justice may adjourn the court from day to day; by section seven, may appoint their clerk; by section eight, their oaths are prescribed; and by section thirteen, the jurisdiction of this court is settled, and is exclusive in all controversies of a civil nature, where a state is a party, except between a state and its citizens; and except only between a state and the citizens of other states, or aliens, in which latter case it shall have original, but not exclusive jurisdiction; and shall have exclusively all such jurisdiction of suits or proceedings against ambassadors, or other public ministers, or their domestics, or domestic servants, as a court of law can have, or exercise, consistently with the law of nations; and original but not exclusive jurisdiction of all suits brought by ambassadors, or other public ministers, or in which a consul or vice-consul shall be a party; and trials of issues in fact in the Supreme Court in

Act of Congress, Sept. 24, 1789.

CH. 187.

Art. 3.

The Federal courts have a common law jurisdiction in criminal cases.

4 Dallas, 420, none if both parties be aliens.—Id. 420.

1 Cranch, rules of court, 15, 18.

Act of Congress, Sept. 24, 1789.

Sec. 5, 6.

Section 7.

Section 11.

all actions at law, against citizens of the United States, shall be by jury." This court has "appellate jurisdiction from the Circuit Courts, and courts of the several states," according to the provisions of this act, as stated in the next article. As to *prohibitions*, and writs of *mandamus*, admiralty &c. jurisdiction; see Ch. 186. By subsequent acts of Congress this court has many years consisted of seven judges.

§ 4. And by the twenty-fifth section of this act, this Supreme Court has power to correct, on error, the decisions of the highest State courts, where they decide against a title claimed under Federal law.

§ 5. The clerk of this court must keep his office at the seat of government: cannot practise as a lawyer in it, nor suffer any record to go out of his office.

ART. 3. *Circuit Courts.*

§ 1. By the fourth section of this act, the United States were divided into three circuits, Eastern, Middle, and Southern; these have been varied from time to time, as states have come into the Union, and its population has varied. A circuit court was provided for in each, to be holden twice a year in each district in each circuit, a district usually being a state. By this section each circuit court consisted of two justices of the Supreme Court, and the district judge of the district; any two of them was a quorum; but no district judge can "give a vote in any case of appeal, or error, from his own decision, but may assign the reasons of such his decision." The times and places of holding these circuit courts have been, and are, often varied by acts of Congress; hence, not material to name them. By the same section, these courts have power to hold special sessions for the trial of criminal causes, at any other time, at their discretion, or at the discretion of the Supreme Court. One judge may adjourn from day to day; or if none present, the marshal may, until a quorum be convened. Special adjournments and continuances provided for. See said sixth section.

The clerk of the district court is clerk of this circuit court in the district, and takes the oath of office, and gives bonds with sureties.

§ 2. The powers and duties of the circuit courts are designated, partly in the 9th section of the said act, already cited, Ch. 186, a. 10. By the 11th section of this act, the circuit courts have original cognizance concurrent with the courts of the several states, of all suits of a civil nature at common law, or in equity, "where the matter in dispute does not exceed \$500, and the United States are pls. or petitioners; or an alien is a party, or the suit is between a citizen of the state, where the suit is brought, and a citizen of another

state," and have "exclusive cognizance of all crimes and offences cognizable under the authority of the United States," except &c; "and concurrent jurisdiction with the district courts, of the crimes and offences cognizable therein." But no person can be arrested in one district, for trial in another, in any civil action, before a circuit or district court; and no civil suit in either court can be brought against an inhabitant of the United States, by any original process in any other district but that whereof he is an inhabitant; or in which he shall be found when sued; and the assignee of a contract can have no other action on it than the original contractee can have, except in cases of foreign bills of exchange; "and the circuit courts shall also have appellate jurisdiction from the district courts under the regulations and restrictions" established by this act.

CH. 187.  
Art. 3.

§ 3. By this section, if a suit be commenced in any State court against an alien, or by a citizen of the state in which the suit is brought, against a citizen of another state, and the matter in dispute exceed \$500, then provision is made for carrying the cause into the circuit court next to be held in the district &c.; and attachments hold to final judgment. So where title to land is claimed under another state, of the value of \$500; "and the trial of issues in fact, in the circuit courts, shall in all suits, except those of equity and of admiralty and maritime jurisdiction, be by jury." See the 19th and 21st sections of this act, stated above, Ch. 186, a. 10.

Section 12.—  
See who is  
def. &c.  
Cabot v.  
Bingham,  
Ch. 227, s.  
32 &c.

Construction in Virginia of this 12th section; 4 Hen. & M. 173, 180, *Brown v. Crippin & al.* Held a matter of right in the deft. so to remove on complying with the terms prescribed; and if the inferior court refuse to allow the removal, it is compellable to do it by *mandamus* from the supreme court of the state, not circuit court.

§ 4. By this section, final decrees and judgments, in civil actions, in a district court, where the matter in dispute exceeds \$50, may be re-examined, reversed, or affirmed, in a circuit court, holden in the same district, upon a writ of error, therewith being returned an authenticated transcript of the record, and assignment of errors, and prayer of reversal, and citation to the other party; "and upon a like process, may final judgments and decrees in civil actions, and suits in equity in a circuit court, brought there by original process, or removed there from courts of the several States, or removed there by appeal from a district court, where the matter in dispute" exceeds \$2000, be re-examined, reversed, or affirmed, in the Supreme Court. Foreign attachment lies not where the trustee is of another State, and not found out of it. 2 Dallas, 396.

Section 22.

CH. 187.

Art. 5.



Judicial act  
of Congress  
of Sept. 24,  
1789.

§ 5. By this act, one judge of the Supreme Court only, was enabled to hold a circuit court, instead of the two above named. This court has cognizance of indictments for offences committed by consuls. Act of Congress, March 2, 1793, 2 Dallas, 297, 299.

ART. 4. *District courts.* (See their powers, Ch. 186, a. 10.)

By the 2d section of this act, the United States are divided into districts, usually each state forming one; and by the 3d section, a district court is established in each, held by one judge, resident in the district, who holds annually four sessions, and may also hold special sessions or courts at his discretion. By the 6th section, he may adjourn his court by an order to the marshal; the powers and duties of this district court are generally contained in the 9th section of this act, cited at large above, in Ch. 186, a. 10, where it was proper to consider the principles of *admiralty and maritime jurisdiction*; and as to appeals &c. from this court, see articles 2 and 3, this chapter; and it has been decided this court has exclusive cognizance of informations and suits for forfeitures. Writs of error to remove causes into the Supreme Court of the United States, can only issue from the clerk's office of that court. District courts possess all the powers of courts of admiralty, as instance or prize courts; 3 Dallas, 6, 16; can restore a vessel taken as prize, owned by neutrals and Americans, id.; 2 Dallas, 365; 2 Dallas, 401.

ART. 5. *Powers common to all these courts.*

Judicial act  
of Congress,  
Sept. 24,  
1789.

§ 1. By several sections in this act, all these courts have power to issue writs of *scire facias*, *habeas corpus*, and all other writs "necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law;" to compel parties to produce books and writings in evidence, and to grant new trials &c. See those heads. The 16th section provides, "that suits in equity shall not be sustained in either of the courts of the United States, in any case where plain, adequate, and complete remedy may be had at law."

§ 2. By the 17th section of this act, all these courts have power to impose and administer all necessary oaths and affirmations, and to punish by fine and imprisonment, at the discretion of the said courts, all *contempts* of authority in any cause or hearing before the same; and to make and establish all necessary rules for the orderly conducting business in the said courts, provided such rules are not repugnant to the laws of the United States."

Lofft, 160,

Every court must so regard its own proceedings, as not to suffer them to be eluded by an application to another.

Act of Congress,  
Sept.  
24, 1789.

Where Federal courts are governed by State laws, act of Congress, September 24, 1789, section 34, see post, article

16. By section 30, of this act, "the mode of proof by oral testimony and examination of witnesses in open court, shall be the same in all the courts of the United States, as well in the trial of causes in equity and of admiralty and maritime jurisdiction, as of actions at common law;" and it is a general rule, that wherever magistrates are to execute a *judicial act*, they must act together, as to appoint overseers of the poor, or to bind out a poor apprentice, or to make an order of removal. 3 D. & E. 38, 380, *Rex v. Forrest*; 2 East, 244; but *aliter*, where they act *ministerially*, as allow a poor rate; *id.*

CH. 187.  
Art. 5.



§ 3. Rules of court are, in this place, used in a limited sense; that is, including only those standing important rules of practice which have been formally made and published by our highest courts from time to time; few in number, but applicable to many cases. From the year 1789, to the year 1803, the Supreme Court of the United States made eighteen such rules.

1 Cranch,  
Preface, 16,  
17, 18.

§ 4. The first four respect the admission, oaths, and practice of attornies and counsellors; they forbid the clerks to practise as either in this court; for admission as such, they must have been three years in practice in the supreme courts of their states, and of fair private and professional characters; they forbid counsellors to practise as attornies, and attornies as counsellors, in this court; but by the fourteenth rule, made August 12, 1801, counsellors were admissible as attornies in it. The fourth and sixth rules prescribed the form of the oath or affirmation, and was: "I — do solemnly swear, that I will demean myself as an attorney or counsellor of this court uprightly, and according to law, and that I will support the constitution of the United States."

§ 5. The fifth rule directed all processes of the court to be in the name of the president of the United States, and the seventh rule adopted the practice of the courts of King's Bench and Chancery in England, as affording outlines for the practice of this court. Eighth rule directed "a statement of the material facts of the case," to be furnished the judges by "the counsel on each side of the cause." [Like rule in Connecticut, with the authorities, 3 Day's Ca. 29.]

§ 6. The ninth rule directed "all evidence on motion for a discharge upon bail," to be by way of *deposition*; and the tenth rule, that process of *subpoena*, issuing out of this court, in any suit in equity, shall be served on the deft. sixty days before the return day of the said process; and further, if the deft., on such service of the *subpoena*, shall not appear at the return day contained therein, the complainant shall be at liberty to proceed *ex parte*. The fifteenth rule is the same as to proceeding *ex parte*.

CH. 187.  
Art. 5.



§ 7. The eleventh rule directed the clerk of the court to which any writ of error should be directed, to "make return of the same, by transmitting a true copy of the record, and of all proceedings in the cause, under his hand and the seal of the court." The thirteenth rule forbade any record to be taken out of the court but by its consent.

§ 8. The sixteenth rule gave the deft. an election to appear or not, on such service. The seventeenth rule allowed ten per cent. interest, when a writ of error was sued, merely for delay on the judgment, in the name of damages; eighteenth rule, otherwise, allows six per cent. Several other rules have been added since 1803, as in Cranch's Reports, and in Wheaton's Reports; three rules, 6 Wheaton.

§ 9. Various rules of court in Massachusetts have been cited in considering the subjects to which they apply; also see sundry rules in relation to counsellors and attornies, 1 to 16; 2 Mass. R. 72, 74, and another rule, page 105, revised.

§ 10. Rules of courts in New York are numerous, many of which are cited in this work in considering the subjects to which they respectively relate; see further, Coleman 44, 122; 1 Caines' R. 494; one as to the admission to practise, is as follows: "every person who shall have regularly pursued juridical studies under the direction or instruction of a professor or counsellor at law for four years, within this state, shall be entitled to a license to practise as counsel in the court (Supreme Court). Caines' R. 494, and 4 Johns. R. 192.

§ 11. No agreement between attornies can be noticed, unless reduced to writing; 2 Caines' R. 95. This rule also extended to parties; 3 Caines' R. 129; but admitted, if not in writing and not resisted, but admitted to exist. 131.

§ 12. Rules of court in Connecticut, Superior and Supreme Court's rules: The presiding judge in the several circuits shall, in charging the jury, state to them the several points of law which may arise, and declare to them the opinion of the court thereon; 3 Day's Ca. 28. Bills of exceptions shall not hereafter be admitted; but motions for new trials shall be admitted in all cases in their room, to be filed within forty-eight hours after the verdict, during the session of the court, page 29. The several circuit courts may at their discretion refuse such motions for new trials as they may think proper for the opinion of the nine judges with or without stay of execution, id.; other rules, 3 Day's Ca. 278; 4 Day's Ca. 119, 468.

§ 13. Sundry rules of the Court of Appeal in Virginia, made between 1783 and 1807; 1 Hen. & Mun. R. I. to IV.; also rules of practice settled in the late High Court of Chancery

and present Superior Court of Chancery, V. to VIII. (Richmond District.)

CH. 187.  
Art. 6.

ART. 6. *Courts in Federal territories.*

Territorial  
ordinance of  
July 13, 1787.

§ 1. The foundation of all the governments in the territories of the United States, is the ordinance passed by the Old Congress, July 13, 1787; this provides that three judges be appointed to constitute a court, and two of whom to form a court, "who shall have a common law jurisdiction, and reside in the district (North-west territory,) and have each therein a freehold estate, in five hundred acres of land, while in the exercise of their offices, and their commissions shall continue in force during good behaviour. The governor and judges, or the majority of them, shall adopt and publish in the district, such laws of the original States, criminal and civil, as may be necessary and best suited to the circumstances of the district, and report them to Congress from time to time; which law shall be in force in the district, until the organization of the general assembly, unless disapproved by Congress; but afterwards the legislature shall have authority to alter them as they shall think fit." This ordinance has been extended to, and made the territorial constitution in each territory belonging to the United States. But the power of appointing judges and other territorial officers, vested by this ordinance in the revolutionary Congress, has been, since the Federal constitution was put into execution, transferred to, and vested in, the president of the United States, with the advice and consent of the Senate. But each territorial legislature, after formed, having with the consent of the territorial governor, had power to alter the laws, and to new form courts, have in many cases established considerable variety of courts in different territories, and at different times. But as all these territorial courts, (as the territorial governments also) have been and are in their nature temporary, and rapidly giving place to State governments, and courts, it is not material to say much concerning them.

§ 2. Several other courts were established under the Confederation; but as they soon gave place to the said courts described in the second, third, and fourth articles in this chapter, it cannot be useful here to take up time in giving an account of them. They were principally instituted to decide on captures made in the war of the revolution, and to settle territorial disputes among the several States; except, however, courts of inquiry, and courts martial in military and naval affairs, established in this revolution, by articles of war. These in substance, have remained, as those articles of war have been substantially continued.

CH. 187. ART. 7. *Decisions as to the powers and duties of Federal courts &c.*  
 Art. 7.



As to jurisdiction, see Estates by Aliens, Ch. 131; and Fairfax v. Hunter, a. 3, s. 7.—Gelston v. Hoyt, Ch. 224, a. 2, s. 1, 10, &c.—Ch. 186, a. 11, s. 16.

3 Cranch, 298, Douglas v. Mc Allister.

3 Dallas, 308, 318, Olney v. Arnold.—4 Cranch, 46.

§ 1. These as yet made, are but few; and it will be found that these few have been mostly considered or noticed already in chapters, in which cognisance, *certiorari*, error, prohibition, *mandamus*, jurisdiction, &c. have been considered; especially Ch. 75, Ch. 186. A few cases may be here added.

§ 2. Though a district judge be on the bench, yet if he do not sit or take any part in the cause, he is absent in contemplation of law. As to jurisdiction, the court regards the condition, not the penalty, of the bond. 3 Dallas, 35; Ch. 143, a. 3, s. 3, 4; 4 Cranch, 316.

§ 3. The court upon a jury trial is bound to give an opinion if required, upon any point relevant to the issue in the cause. The parties have a right to this opinion.

§ 4. The Superior Court of Rhode Island, is the highest court of law in that State, within the fair construction of the twenty-fifth section of the said judicial act; and though the legislature there, may set aside a decision, yet it cannot make one.

If both parties be aliens, the Federal courts have not jurisdiction.

3 Dallas, 320, 369, 382.—2 Cranch, 9, Wood v. Wagon; 126, Capson v. Van Noorden.

Consent of parties cannot give jurisdiction.

Ch. 76, a. 10, s. 30.—3 Dallas, 378, Hollingsworth v. Virginia.

§ 5. To give the Federal courts jurisdiction of a cause, the declaration and process must expressly allege that the parties are citizens of different States. These courts having only specified or enumerated powers as to common law proceedings, to give them jurisdiction, it is necessary expressly to bring the action within these powers; and if a court of limited jurisdiction have not jurisdiction, the plt. may have error, though he resorted to it; or for error of the court.

§ 6. The amendment of the constitution, as to suing States, took from these Federal courts all jurisdiction on this subject, as well in regard to pending, as future actions; for if they ever had the power to sustain an action against a State, this power was taken away by the amendment, and there was no reservation as to pending suits.

2 Cranch, 445, Hepburn v. Elbry.

§ 7. Held, the Circuit Court of the United States, for the District of Virginia, has no jurisdiction in cases between citizens of Virginia and citizens of the District of Columbia, as they cannot be considered as citizens of different States.

3 Dallas, 467, Cobbet's case.

§ 8. A civil action by a State against an alien, cannot be transferred from a State court to the Circuit Court: so not a suit of a criminal nature, as debt for a forfeited recognisance.

2 Cranch, 127

§ 9. If a Federal court has not jurisdiction of the suit, the plt. may assign this for error, though he resorts to such

court; and if an error of the court, the party may take advantage of it, though in his favour.

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§ 10. Where Federal law is silent, State law governs, in many cases; as in the Circuit Court at Boston, where an action had been brought in it, and bail taken. Judgment against the principal, and execution returned not satisfied. Held; *scire facias* could not issue after a year, against the bail; for Massachusetts act on this subject is the law that governs the case, as there is no Federal statute on the subject. See jurisdiction as to corporations, citizens, &c., Ch. 76, a. 10, s. 30; Ch. 143, cases of the United States Bank v. Dartmouth College & al.

§ 11. An executor cannot maintain an action in the District of Columbia, on letters testamentary granted in a foreign country; nor can he in Massachusetts. See Goodwin v. Jones & al.: and a justice of the peace in the said District is an officer of the Federal government, and by its laws exempted from militia duty. See the power of the Supreme Court of the United States, as to commissions, &c. Marbury v. Madison.

Dixon v. Ramsay, 3 Cranch, 319, 324, 331 — Ch. 186, a. 9, s. 9.

§ 12. The powers of the revolutionary Congress in several cases; especially as to the court of commissioners of appeal. How the amendment of the constitution as to suing States operated. The article in the constitution as to *ex post facto* laws explained; 3 Dallas, 386. The exemptions of the members of Congress from arrest judicially explained; 478. Congress can by statute transfer a cause from one inferior court to another; and may constitutionally impose on the judges of the Supreme Court of the United States, the burden of holding the Circuit Courts, and without circuit commissions. 3 Dall. 54 &c. is Penhallow v. Doane's administrator.

3 Dallas, 19, 42, 54 to 120. —3 Dallas, 382.—Stewart v. Laird, 1 Cranch, 299.

§ 13. The power of a judicial nature was legally exercised by the legislature of Connecticut, under the charter. 3 Dallas, 386, 401, Calder & ux. v. Bull & ux.

§ 14. A contemporary exposition of the constitution of the United States, adopted in practice and acquiesced in for a number of years, fixes the meaning of it, and the courts will not control it; (was twelve years.)

Stuart's case, 1 Cranch, 299.

§ 15. It is not a ground of a writ of error, the court below, of the United States, refused to continue a cause after issue joined. Marine Ins. Co. v. Hodgson; Woods & al. v. Young. Though the plt. be an alien, the deft. must be described, as a citizen of one of the States, to give the Federal courts jurisdiction.

4 Cranch, 237.—6 Cranch, 208.

§ 16. The members of a court martial are trespassers if they impose a fine on a man not liable to military duty; and

Wise v. Withers.—3 Cranch, 331.

CH. 187. the court martial in the District of Columbia has not exclusive jurisdiction of the question, Who are subject to military duty? The Federal courts have jurisdiction in a case between citizens of the same State, if the plt. sue to the use of an alien.

Art. 7.  
Brown v.  
Strode, 5  
Cranch, 303.

Rules of  
Court, 18.

§ 17. In error, the plt. may shew jurisdiction in the court, by affidavit, by shewing the matter in dispute exceeds the value of \$2000. Seizures must be tried where made. 5 Cranch, 304, 310, on the act of Congress of February 18, 1798, Keene v. United States.

Houston v.  
Moore, 5  
Wheat. 1 to  
76, in error.

§ 18. *Federal and State jurisdiction as to drafted militia.* The substance of this case was briefly thus: in the British war in the year 1814, the president called for a draft of the militia, which included Houston, the plt., on the acts of Congress of February 28, 1795 &c.; and Pennsylvania, the plt's. State, enacted a law, inflicting on these drafted militia-men for neglecting to march &c. the same penalties in amount the acts of Congress inflicted, and appointed State courts martial to try the delinquents: by one of them Houston was tried and fined, and the fine was by the marshal, Moore, levied on his property, and Houston brought trespass, and judgment against him, in the State courts, on the ground the State statute and State courts martial were consistent with the constitution and laws of the United States. On error to the Supreme Court of the United States, it confirmed the State judgment; but two judges dissented: three gave their opinions at length; they all mentioned, though not very distinctly, a distinction, which, if well founded, as I think it was, excluded all collision of Federal and State jurisdiction in the case. The distinction was thus: whatever were the constitutional powers of the Union, as to the militia, the acts of Congress acted upon and punished Houston's disobedience *only after* he should have arrived at the place of rendezvous, and while he, after that time, should have been in the actual service of the United States, and the State law was made to act upon, and to punish his disobedience *before* that time; if so, the Federal law punished, at one period of time, misconduct in actual service, and after arriving at the rendezvous; and the State law, at another period of time, that is, *before* such arrival; in such case there was no collision of jurisdiction; nor did the State assume to execute Federal law, but on its ancient power retained over the militia in a case the Union had not by statute provided for, enacted law to compel this drafted militia to march to the place of rendezvous, and to enter the actual service of the United States. The moment the State enacted the penalties, they were State penalties, and these only she enforced; their

being to the same amount Congress enacted was immaterial, as they were not the less State penalties on that account. Without the above distinction, the case was involved in serious difficulties, and in considering which the three judges, who gave their opinions, reasoned very differently; even those who arrived at the same conclusion. The clause as to impairing contracts affects no State law passed before March 3, 1789.

§ 19. Where two or more joint plts., or two or more joint defts. &c. each plt. must be able to sue each deft. in the courts of the United States, to give them jurisdiction; and if the plt. be an alien, the deft. must be expressly described as a citizen of one of the States.

§ 20. If a State court decide in favour of the privilege claimed under an act of Congress, the Supreme Court of the United States has no jurisdiction on a writ of error in a State court; hence, it seems the object of the superintending power of the Union, was, in this respect, to prevent the several States impairing the powers of the Federal head; and a decree of the highest court of equity in a State (court for the trial of impeachments and the correction of errors in New York,) affirming the decretal order of an inferior court of equity (the Court of Chancery in New York) refusing to dissolve an injunction granted on filing a bill, is not a final decree within said twenty-fifth section. In this case Ogden filed a bill below against Gibbons, in said Chancery Court, for an injunction to restrain him from navigating certain steam-boats on the waters of the State of New York, lying between Elizabethtown, in New Jersey, and the city of New York, the exclusive navigation of which had been granted by the legislature of New York, to Livingston, Fulton, and others, to be used with steam-boats, and under whom the plt. below claimed as assignee. The injunction was granted by the chancellor. The answer came in claiming a right to navigate there with steam-boats, under a United States license to carry on the coasting trade. Gibbons moved to dissolve the injunction. The chancellor denied the motion: Gibbons appealed to said court of errors &c., which affirmed the said decretal order, refusing to dissolve the injunction: from this last order Gibbons appealed to this court. Decided as above, as no final decree had been made. Question as to Federal and State jurisdiction.

This case involved a similar question: held, to maintain a suit in the Circuit Court, the jurisdiction must appear on the record. The parties were not described as citizens of different States. Bill dismissed.

If there be a division of opinion in a Circuit Court, on a motion for a new trial, in a civil or criminal cause, it is not

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Owing v.  
Speed, 6  
Wheat. 420.

Strawbridge  
v. Curtis, 3  
Cranch, 267,  
268.—Hodg-  
son v. Bower-  
bank, 5  
Cranch, 303.

Gordon v.  
Caldcleugh, 3  
Cranch, 268.  
—Gibbons v.  
Ogden, 6  
Wheat. 448.

Sullivan &  
al. v. The  
Fulton  
Steam-boat  
Company.

U. States v.  
Daniel, 6  
Wheat. 642.

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The Sloop  
Sally v. U.  
States, 5  
Cranch, 372.  
—6 Cranch,  
308, 334,  
Durousse &  
al.v.U. States.

U. States v.  
Brig Union, 4  
Cranch, 216.

Rose v.  
Himley, 4  
Cranch, 241.

Kemp's les-  
see v. Kenne-  
dy, 5 Cranch,  
173.—Cro.  
El. 489, Hol-  
man v. Col-  
lins.—Cro. J.  
181.—Rol.  
Abr. 445, 795.

4 Burr. 2244.  
—3 D & E.  
185.—Cowp.  
20.—1 Wils.  
316, Thorn-  
ton v. Smith.  
—Snik 202.  
—2 Mod.  
273.—9 Mod.  
95.—2 Dal-  
las, 381 and  
338, Mans-  
field's lessee  
v. Levy.

one that is to be certified to the Supreme Court, under sixth section of the judiciary act of 1802, c. 291.

§ 21. Whenever the District Court in the District of Maine acts as a district court, the appeal is to the Circuit Court in Massachusetts, and not *directly* to the Supreme Court of the United States; but this court has appellate jurisdiction from the decisions in the districts in Kentucky, Ohio, Tennessee, and Orleans, and the citizens of the territory of Orleans may sue and be sued in the District Court, as one of Kentucky may sue and be sued in the court of Kentucky.

§ 22. It is always necessary for the plt. in a writ of error, to show the Supreme Court of the United States has jurisdiction of the cause; but it will hear *parol* evidence as to the value of the property &c., the sum claimed &c.; the appraisal in the district court is not conclusive evidence of the value, but better than that of one witness; and 5 Cranch, 13, 15, 287.

§ 23. Held, the Federal courts may examine the claims made on the condemnations of foreign courts, and examine into their jurisdiction, and if a foreign court cannot, consistent with the law of nations, exercise the jurisdiction it assumes, its sentence is not to be regarded; but of their own jurisdiction, as far as it rests on municipal law, the courts of every country are the exclusive judges. See more of this case, Ch. 186, a. 9, s. 12, &c.; the inquiry may be as well as to the constitution of the court, as it may be as to the situation of the prize.

§ 24. Held, the inferior court of Common Pleas for the county of H., in New Jersey, in May, 1779, had general jurisdiction of all cases of inquisition for treason, and that its judgment was not void, though erroneous, as it had jurisdiction of the cause. All courts from which an appeal lies are inferior courts in relation to the appellate court. The courts of the United States are all of limited jurisdiction, and their proceedings are erroneous if it be not shown they have jurisdiction; judgments rendered in such cases may be reversed: but are they absolute nullities, wholly to be disregarded?

§ 25. The ancient rule seems to have been to presume nothing within the jurisdiction of inferior courts and courts of limited powers, but what was expressly alleged and shown to be within their jurisdiction; but the modern rule is somewhat different; and of late years greater indulgence has been shown to inferior courts, and the presumption has rather been in favor of their jurisdiction; and does not the same reason hold in regard to courts of limited powers? Still, however, the cause of action must be expressly alleged to have arisen within the jurisdiction of the court; 1 Wash.

81; where it is one of a *limited* jurisdiction, though not of an inferior one, and the cause must appear on the record to be within it. 3 Dallas, 382; 4 Dallas, 7, 8, 13; 1 Cranch, 343, Ch. 187. Art. 7. Ch. 76, a. 10, s. 30; Ch. 194, a. 2, s. 27.

A fraudulent conveyance does not give jurisdiction, as 2 Dall. 331. where the citizen of one State conveyed lands to a citizen of another, for the sole purpose of giving jurisdiction to the Federal courts, to decide on title to lands, which otherwise they would not have had, as the dispute would have been between citizens of the same State. Held, these courts had no jurisdiction; *Maxwell's lessee v. Levy*; the fact had been disclosed in a suit in equity.

§ 26. This case involved the great question of State rights; the State of Virginia prosecuted P. J. & M. J. Cohens, in the Quarter Session Court for the borough of Norfolk, for selling lottery tickets, contrary to a law of Virginia. Defts. defended themselves under an act of Congress, authorizing the sale of lottery tickets, but as finally construed, not extending beyond the limits of the District of Columbia; being convicted in that court, and the law of Virginia not allowing them an appeal, they sued out a writ of error to that court, on the 25th section of the judiciary act of September, 1785, and brought the cause into the Supreme Court of the United States. This cause, the report of which occupies near 208 pages, was very fully considered, and the court unanimously decided—

*Cohens v. State of Virginia*, 6 Wheaton's R. 264 to 447.

1. This court has appellate jurisdiction under said judiciary act, from the final decree or judgment of the highest court of law or equity of a State, having jurisdiction of the subject matter of the suit, where is drawn in question the validity of a treaty, or statute of, or an authority exercised under, the United States, and the decision is against their validity: or, 2. Where is drawn in question the validity of a statute of, or an authority exercised under, any State, on the ground of their being repugnant to the constitution, treaties, or laws of the United States; and the decision is in favor of such their validity: or, 3. Where is drawn in question the validity of the constitution, or of a treaty, or statute of, or commission held under, the United States; and the State decision is against the title, right, privilege, or exemption, especially claimed by either party, under such constitution, treaty, statute, or commission, of the United States. It will be observed, there were three new points in this cause: 1. The writ of error issued to a mere *borough court*, it being the highest court of law or equity in that State having jurisdiction of the case: 2. The State was a party deft. in error, but originally the prosecutor: 3. The parties were not of dif-

CH. 187. *ferent States &c.*, but one party was the State, and the other her own citizens. On examination, it will be found that the objection made by Virginia, that a State is not suable since the constitution was amended in regard to State suability, had no foundation in this case; because that amendment respects only suits in which a State is sued in the first instance, and against her consent summoned into court, at the will of any plt., not to suits in which she herself is plt. or prosecutor, and so voluntarily engages in the suit, and must submit, of course, to the usual course of the law, as to appeals, reviews, writs of error, &c.; as to the same State embracing both parties, it may be observed, as it was observed that this circumstance, where a State court misconstrues the constitution, a treaty or statute of the United States, in favor of State authority, and against that of the Union, makes no difference to allow so many State courts, wherever the parties may live, *finally* to construe the laws of the Union, must be destructive of it, and productive of numerous and different constructions of them. Parties being of the same State makes no difference on this account. 6 Wharton, 131, 135.

7 Cranch, 32,  
33, U. States  
v. Hudson &  
al.; but see  
1 Wheaton's  
R. 415.

§ 27. The circuit courts have no jurisdiction at common law in the cases of libels against the United States; decided on an indictment for a libel on the President and Congress of the United States, contained in the Connecticut Courant, of May 7, 1806, charging them with having in secret voted two millions of dollars as a present to Bonaparte, for leave to make a treaty with Spain: 2. Of all the Federal courts, the Supreme Court alone "possesses jurisdiction derived immediately from the constitution, and of which the legislative power cannot deprive it:" 3. All the other Federal courts "possess no jurisdiction but what is given them by the power that creates them, and can be vested with none but what the power ceded to the general government, will authorize them to confer:" 4. "Certain implied powers must necessarily result to our courts of justice, from the nature of their institution. But jurisdiction of crimes against the State, is not among those powers. To fine for contempt, imprison for contumacy, enforce the observance of orders, &c. are powers that cannot be dispensed with in a court, because they are necessary to the exercise of all others."

7 Cranch,  
116, 147,  
Schooner  
Exchange v.  
M'Faddon &  
al.

§ 28. Appeal from the sentence of the Circuit Court, Pennsylvania; the libel, filed by M'Faddon & al., stated that they, at Baltimore &c., owned this Schooner, October 27, 1809; that she sailed, bound to St. Sebastian's, in Spain, and, peaceably pursuing her voyage, was forcibly seized under the decrees of Napoleon, emperor of the French, and unlawfully taken from the libellant, in violation of their rights, and of the

laws of nations, &c.; that she had been brought into Philadelphia, not having ever been condemned by any competent court; still their property &c. was there seized. The District Attorney, Dallas, filed a suggestion, as understood, at the request of our government, stating her true situation; that she was a public vessel of war, of the French emperor, who was in a state of peace and amity with the United States, and in distress, peaceably entered said port for repairs &c.; and moving for her liberation with costs. Held, as a general principle, that a public vessel of war of a foreign sovereign, at peace with the United States, coming into our ports, and conducting herself in a friendly manner, is not subject to the jurisdiction of our courts or country. In other words: Can a citizen in our courts assert his title to such a vessel? Or must not his claim, in such case, be a subject of public negotiation? Clearly the latter.

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§ 29. A State court has no jurisdiction to enjoin a judgment of a circuit court of the United States. The State injunction was to prevent the said circuit court's issuing a writ of *habere facias possessionem*, on a judgment that had been rendered.

7 Cranch,  
279, 281,  
M'Kinn v.  
Voorhies.

§ 30. The circuit courts of the United States can issue writs of *mandamus* only in those cases in which it is essential to the exercise of their jurisdiction. Hence, held, such writ could not be issued to the register of the land office in Ohio, to command him to issue a final certificate of purchase to the plt. for certain lands in that State. These courts have this power under the judiciary act, but in specified cases, *secus* as to the Supreme Court.

7 Cranch,  
604, M'Intire  
v. Wood.  
See *mandamus*, Ch. 186;  
see 2 Wheat-  
on's R, 369.

§ 31. Held, a Circuit Court of Tennessee, as a court of equity, has no jurisdiction to issue a writ of *habere facias possessionem*; the deft. in equity had refused to deliver possession to the complainant, according to the decree. The court above, directed the Circuit Court to quash the *habere facias* which had been executed, and to award a writ of restitution of the lands.

7 Cranch,  
602, Wallen  
v. Williams.

§ 32. Appeal from the Circuit Court, Massachusetts, which condemned 550 tons of pine timber, claimed by Brown, the appellant. This timber was British property, taken on board an American vessel, April 9, 1812, at Savannah. She sailed for England, but put into New Bedford for repairs, was there unladed, and there remained till seized as enemy's property, about April 5, 1813. The timber was put into a salt water creek, not navigable, for safe keeping, and there was seized in the war. At low water, the ends of this timber rested on the mud, and at high tide, was prevented from floating away by booms. Held: 1. This timber was landed: 2. As it was

8 Cranch,  
110, Brown  
v. U. States.

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found *on land* in the United States, when the war commenced between them and Great Britain, it could not be condemned as enemy's property, without an act of Congress authorising its confiscation: 3. Congress' act, declaring war, was not such an act: 4. Our courts of law have no power or jurisdiction to condemn property as enemy's, but in virtue of some act of Congress. Story J., *contra*; see his opinion, p. 129 to 154.

9 Cranch,  
359, Brig  
Alerta and  
cargo.

§ 32. The circuit courts of the United States have jurisdiction in writs of right; see Writs of Right, and 8 Cranch, 229; 9 Cranch, 289; in a case of titles, claimed under Vermont and New Hampshire; see Pawlet, town of, v. Clark & al., Ch. 48, s. 41, and 9 Cranch, 292.

§ 33. Appeal from the sentence of the District Court, New Orleans. It has jurisdiction, as has each district court of the United States (when they are neutral) to restore a vessel to its original owner, whose nation is at peace with the United States, when captured by his enemy's vessel, whenever her force has been increased in the United States, if the vessel captured be brought into one of our ports. The privateer's crew had been increased at New Orleans.

1 Wheaton's  
R. 91, Corp.  
of New Or-  
leans v. Win-  
ter & al.

§ 34. Held, the Circuit Court of Louisiana had no jurisdiction in a case in which a citizen of the Mississippi Territory was a party, though joined with a citizen of Kentucky in the suit, who had a right to sue in that court: and on the general principle settled in *Hepburn & al. v. Ellzey*, 2. The courts of the United States have not jurisdiction unless *all* the parties *plts.* and *all* the parties *defts.* have individually a right to sue in those courts: 3. If any one of either party has no such right, the court has no jurisdiction, and the suit must be abated.

1 Wheaton's  
R. 238, Le  
Invincible.

§ 35. Held, the courts of the United States have no jurisdiction over the cruisers of friendly powers, duly commissioned to afford remedies to our citizens, for the torts committed on their property by those cruisers at sea; except where such cruiser has been fitted out in some port of the United States, in violation of their neutrality: was an appeal from the Circuit Court for the District of Massachusetts. Before the *Le Invincible* had been taken and brought into Portland, in May, 1813, she had, as a duly commissioned French privateer, tortiously captured a vessel, *Mount Hope*, and her cargo, of two American citizens, who filed their claim for damages in the District Court of Maine, in which *Le Invincible* had been libelled as a recaptured vessel by the recaptors &c. The decision was on the general principle the commissioned captor can be held to answer but in the courts of his own country, in this case of France, for

the capture legal or not, of the Mount Hope; hence, her owners, Hill & Cobb, must pursue their claim in the French courts: not within the exceptions to the general rule; see *Talbot v. Jansen*, Ch. 131, a. 6, s. 8. Held, also, the *Le Invincible* was substantially in the situation of the *Exchange*; both a part of the national force; see the case of the *Mary Ford*. But it is the question of prize or no prize, that is exclusively proper for the courts of the capturing power, not of the last actual possession &c. as in the case of the *Mary Ford*, and other cases; but see a. 28.

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Circuit Courts' jurisdiction in a suit between citizens of different States is not affected by their becoming citizens of the same State, *pendente lite*. See this case, *Morgan's heirs v. Morgan*, Ch. 225, a. 10, s. 2.

§ 36. A writ of error to a State court must rest on matter apparent in the record, whether a court of law or equity; and lies only to the highest court in the State: 2. The report of the case by the judge is no part of the record, is but a matter in *pais* relating to a new trial. Writ of error dismissed without costs where the court has no jurisdiction. 2 Wheaton's R. 363, *Ingle v. Coolidge*.—3 Wheaton's R. 433.

§ 37. The Circuit Courts of the United States have jurisdiction where the parties are of the same State, but their respective titles are derived from different States. See *Pawlet v. Clark*, Ch. 48, s. 41; *Colson & al. v. Lewis*. 2 Wheaton's R. 377.

§ 38. A murder committed on board a ship of war of the United States lying in Boston harbour, is not cognisable in the Circuit Court for the District of Massachusetts. The indictment was grounded on the eighth section of the act of Congress of 1790, ch. 9, for the punishment of crimes. The section provided for the punishment of murder &c. committed "upon the high seas, or in any river, haven, basin, or bay, out of the jurisdiction of any particular State." Held, this is to be construed to mean a bay &c. which is out of the jurisdiction of any particular State; and that Boston harbour and bay is clearly within the jurisdiction of Massachusetts, a particular State: further held, *other place*, mentioned in the third section in said act, means *other territorial place*, not a ship of war &c.; therefore, this act did not extend to this case; and the Circuit Court has no jurisdiction in cases of crimes of murder &c., but such as it has under this act; but it seemed to be the opinion of the court, that Congress might have extended the jurisdiction of the Federal courts to murder and other crimes committed in ships of war &c. lying in the ports and harbours of the United States. "The jurisdiction of a State is co-extensive with its territory; co-extensive with its legislative power." This is generally true; but what is its territory? How far does its legislative power ex-

9 Wheaton's R. 337, 391, *U. States v. Bevans*.

CH. 187. tend? Certainly not to the United States navy-yard in Charles-  
 Art. 7. town, nor to the internal government of a United States ship  
 of war lying in the harbour of Boston, of Salem, &c.; and  
 as the above decision is according to the true construction of  
 the said act of Congress, it is very doubtful if there is any  
 law but the articles of the navy, to punish crimes committed  
 in such a ship.

3 Wheaton's  
 R. 591, Cam-  
 eron v Mc  
 Roberts.

§ 39. *Chancery jurisdiction.* Circuit Courts have no power  
 to set aside a decree in equity, on motion, after the term at  
 which made. If the deft. be of one State, and one plt. of  
 another, and so as to them properly in a Federal court; but  
 if this plt. join with another, and it is not alleged of what  
 State he is, the suit must abate, except the first plt. have  
 such a distinct interest he may alone have a decree, without  
 affecting the other plt.: same as to deft. The judges of  
 the Circuit Court of Kentucky were opposed in opinion in  
 this case. But 3 Wheaton's R. 600, if the judges of the  
 Circuit Court for the District of Columbia, be opposed in  
 opinion, the Supreme Court has no jurisdiction: its appellate  
 jurisdiction in such case extends only to a final judgment or  
 decree.

Rose v. Trip-  
 lett.

3 Wheaton's  
 R. 610, 644.

§ 40. *As to robbery at sea.* United States v. Palmer & al,  
 See Ch. 210, a. 7, s. 6. The crime cannot be punished by  
 our courts, if committed on the high seas, on board of a ves-  
 sel wholly belonging to foreign subjects, and by foreigners.  
 This is not piracy within the act of Congress.

See important cases as to the jurisdiction of Federal courts,  
 in relation to State courts, Ch. 224, a. 10, s. 1, 2, *Gelston*  
 & al. v. Hoyt & al.

13 Mass. R.  
 60, Coolidge  
 v. Inglee.

§ 41. The Supreme Court of the United States has no ju-  
 risdiction to issue a writ of error to a State court, unless the  
 record of the action shews the matter on which the party re-  
 lies for a reversal of the judgment: 2. The report of the  
 judge of the proceedings at the trial, is no part of the re-  
 cord; nor are the reasons given by the judges for their  
 opinion; nor are the papers and documents filed in the case.

14 Mass. R.  
 412, Wether-  
 bee v. John-  
 son & al.

§ 42. Trespass against custom-house officers &c. for tak-  
 ing and carrying away certain goods: they claimed to act  
 under the act of Congress of March 3, 1815, which provided  
 in substance, that it shall be lawful in any action &c. before  
 any State court for any thing done &c. by officers of the  
 customs, "after final judgment for either party, to remove  
 and transfer by appeal, such decision during the session or  
 term of said court, at which the same shall have taken place,  
 from such court to the next Circuit Court of the United  
 States, to be held in the district in which such appeal shall  
 be taken in the manner aforesaid;" and final judgment in

the action being given in the State court, such appeal was claimed to the Circuit Court of the United States in Massachusetts District; and the State court denied the appeal; and held, this act of Congress was not warranted by the constitution of the United States. This act was enacted after this suit was commenced, and had expired before the said judgment was given in the State court (Supreme Judicial Court.) The verdict was against all the defts.; but all did not attempt to justify under said act, but one merely pleaded, *not guilty*. Plt's. counsel also urged, that if the defts. meant to have availed themselves of this act they should have endeavoured to remove the cause the first term after the law was enacted. The act expressly including actions pending when it was passed; but the State court did not rely on these matters, but mainly on the ninth amendment to the constitution of the United States, by which it is declared that "no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law; and held, that to carry actions from one court to another by appeal, is not according to the rules of the common law. The plt. relied on the first section of the third article of the constitution of the United States; and thought that the said amendment had no reference to the present case; and cited 6 Cranch, *Durousseau v. United States*: State court also said, that the Federal constitution as originally adopted, authorized an appeal from a State court to the Supreme Court of the United States only, not to any inferior Federal court; and since said amendment "the appellate power, even of the Supreme Court of the United States, can only be exercised over questions of law appearing of record;" that is, by writ of error only, "no such thing as an appeal being known in that system,"—the common law; and no "re-examination of facts once tried by a jury, except in cases of new trial," to be granted only by the court before which the trial was."

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Art. 7.

§ 43. *Jurisdiction on the twenty-fifth section of the judiciary act of September, 1789.* This was error to the Supreme Court of Pennsylvania: Held, 1st, The Supreme Court of the United States has no jurisdiction in the case, if the State court decide only on the construction of State law, a matter confined to the State court: 2. To give the Supreme court of the United States Jurisdiction, it must appear from the record, that the constitutionality of a State law, or an act of Congress, was drawn into question: 3. But it is not necessary the record, in terms, state a misconstruction of an act of Congress, or that an act of Congress was drawn into question. It is enough the record "show that an act of Congress was

4 Wheaton's  
R. 311, Miller  
v. Nicholls.

CH. 187. applicable to the case:" 4. Had the fact of insolvency appeared on the record, so as to let in the United States' priority, that would have enabled the Supreme Court of the United States, to revise the judgment of the State court.

Art. 8.

8 Dallas, 321,  
330, Wiscart  
in error v.  
Dauchy.

§ 44. *Statement of facts, where conclusive.* As where causes of equity and admiralty jurisdiction are removed into the Supreme Court of the United States, with a statement of facts according to the provisions of the Federal judiciary act, but without the evidence, it is well, and the statement is conclusive as to all the facts in it: 2. If removed with such statement, and also with the evidence, still the statement is conclusive as to all the facts in it: 3. What is or is not such a statement of facts.

4 Dallas, 8,  
11, Turner  
adm'r. v.  
Bank of  
North Amer.  
—See 4  
Cran. 46.—6  
Cran. 22.

§ 45. In a suit in a court of the United States, by an indorsee on a promissory note, it must appear of record the original parties to it were citizens of different States, as well as the parties in the action; or one a citizen and the other an alien. This must mean when the Federal jurisdiction depends on the situation of the parties, and not on State misconstruction of Federal law. But see Ch. 20, a. 1, s. 13, contra.

8 Cran. 229.—  
5 Cran. 115.

§ 46. The Circuit Courts of the United States have jurisdiction in writs of right, if the property demanded exceed in value \$500, though the demandant recover less: so the United States courts have jurisdiction, though the claims of a State may be affected ultimately.

4 Cran. 508,  
Chappede-  
laine v. De-  
chenaux.

§ 47. So the Circuit Court has jurisdiction when the plt. is an alien, and the deft. a citizen of a State, though both be executors, and the testators of both were citizens of the same State, and the jurisdiction on the condition of the bond. 4 Cranch, 316, *United States v. Mc Dowell*.

#### ART. 8. *Courts in Massachusetts.*

§ 1. These never have been numerous, generally one Superior or Supreme Court, having jurisdiction throughout the Colony, Province, or Commonwealth; county courts having jurisdiction in each county,—as the Common Pleas, Sessions, Probate, and Justices of the Peace's Courts. Though our courts have not been numerous, and all established by charters, constitutions, or statutes, yet such have been the various arrangements of them, from time to time, that it would be a useless business to notice the very numerous institutions, and organizations of them; therefore a mere sketch only will be attempted here.

§ 2. A proper court of chancery never has been established in Massachusetts; nor any ecclesiastical courts; but only ecclesiastical councils, for advice in mere spiritual concerns; and as early as 1641, provision was made by law, that church censures should not affect any man's civil rights; hence excommunication has had no effect as to those rights.

§ 3. Although writs of error in Massachusetts have ever been allowed, as one mode of correcting erroneous decisions, yet, in practice, they have been but little resorted to; because, in the first place, there never has been any proper court of errors distinct from the Superior or Supreme Court, so that when a cause has been decided in that court, as all causes of much importance usually have been, there has been no way to bring a writ of error, but in that same court to reverse or correct its own decisions: 2. Appeals and reviews have been allowed, and resorted to generally, from an early period in the settlement of the State, and until within a few years past, the *law* and *fact* were considered and settled at the same time, and in the same trial, in which all the judges of the court aided and directed the jury in matters of law.

§ 4. As no reports of adjudged cases were published till the year 1803, it is now not possible, in any good degree, to ascertain on what principles our courts proceeded; how they construed the common law, or our own statutes, or how far they adopted English statutes in deciding a multitude of questions, that must have arisen in about one hundred and seventy years, among a free and active people, ever anxious to have all their controversies and disputes settled according to law. It will be found, that our Colony, Province, and State courts have been organized and established by certain acts, giving them powers generally; but that their powers in detail have been generally vested in them by numerous statutes, directing where suits should be brought, prosecutions had, and matters transacted; none of this detail need be here noticed.

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Art. 9.

ART. 9. *Massachusetts Colony courts.*

§ 1. These were established very early, and in September, 1639, the legislature ordered that every judgment of court, "with all the evidence, be recorded in a book, to be kept to posterity;" also that records be "kept of all wills, administrations, and inventories," marriages, births, and deaths; this was a good law, and had it been well executed, much very useful information and law had been handed down to posterity.

C. & P. Laws,  
43.

§ 2. It does not now appear when the first inferior courts in the Colony were established. The Court of Assistants, established by the charter of 1628, was always in the Colony a Superior Court, as will appear presently; and as early as 1642, there were county courts; and as the plt. was punished with costs for suing in them, in matters of *trespass*, where his damages *recovered* were under 40s., it is to be inferred there were courts inferior to the county courts. In 1642, it appears that some actions were "triable before the commissioners of Boston;" and actions under 40s. before them, or

C. & P. Laws,  
45, 46, 47, 48.

CH. 187. before one magistrate, "or the three commissioners for ending small causes."  
 Art. 9.

As early as 1641, the general court complained that the "country was put to great charge by this court's attending suits commenced or renewed by petition or review," and punished with costs, and even a fine, a plt. who brought a groundless action into this court.

§ 3. By an act passed in 1650, an appeal was allowed from any inferior court to the Court of Assistants, whose decision was final, except in some special cases. By another act of 1654, parties and courts were forbidden to transfer private causes to the General Court; but the Inferior Court was allowed to state the question to be decided, to the General Court, and take its decision, suspending the suit in the mean time; so that the General Court thus decided the difficult questions, in substance, even in private or civil suits.

C. & P. Laws,  
 66, 67.

§ 4. By acts passed in 1647 &c., any magistrate in a town where he dwelt, was empowered, at his discretion, and without a jury, to hear and decide all causes arising in his county, debt or trespass, not exceeding 40s. This same act provided that where there was a town in which no magistrate dwelt, the Court of Assistants, or County Court, might, on the request of the town, "appoint three of the freemen as commissioners, in such cases;" they, or the major part of them, to hear and determine all such causes (debt or trespass) under 40s., where either party was an inhabitant of the town; these commissioners were sworn &c., as were all associates in county courts; and where any commissioners or a magistrate was a party, the selectmen of the town were made a court to decide on such special case; and no debt or trespass under 40s. could be tried in the County Court, but by appeal from the magistrate or commissioners, except in cases of battery and defamation. By an act passed in 1651, the commissioners in Boston were annually chosen, and were empowered to try and decide causes under £10, with one magistrate, residing within the town, and each commissioner was made a judge in *criminal* cases, where the fine did not exceed 40s. for one offence, but an appeal lay from all or any of them to the Court of Assistants; and every man appointed a town commissioner, was to be approved of by the county court.

C. & P. Laws,  
 68, 69.

§ 5. By acts passed in 1634, 1642, &c. it was declared, that the chief civil power in the Commonwealth was vested in the General Court, consisting of magistrates and deputies, (among other things) in matters of *judicature*. Till 1644, they sat together; but by an act passed in March, 1643, it was provided "that if the magistrates and deputies shall happen to differ in any case of judicature, either civil or criminal,

such case shall be determined by a major vote of the whole court, met together."

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§ 6. By an act passed in 1639, two courts of assistants were appointed to be holden in Boston, yearly, by the governor, or deputy governor, and the rest of the magistrates, on days appointed, "to hear and determine all, and only, actions of appeal from inferior courts, all causes of divorce, all capital and criminal causes, extending to life, member, or banishment;" and the governor was impowered to call special courts "for the trial of any malefactor in capital causes."

C. & P. Laws,  
90, 91

§ 7. *County courts.* One was established in each county, to be held by the magistrates living in it, or any other magistrates that could attend the same, or by such magistrates as the General Court should appoint, from time to time, "together with such persons of worth, where there shall be need, as shall from time to time be appointed by the General Court, (at the nomination of the freemen of the county) to be joined in commission with the magistrates, so that there may be five in all, three whereof may keep a court, provided there be one magistrate." This County Court had power "to hear and determine all causes, civil and criminal, not extending to life, member, or banishment," or to causes of divorce. In this court, was a jury of inquests and trials; and in it, also, probate matters were considered and settled; and it deserves our attention that, in this act, our ancestors provided for special courts to expedite the causes of *strangers*, and allowed them their choice of courts in which to sue.

In the year 1672, the General Court resolved, that all *reviews* were to be entered and prosecuted in the court in which the action was first commenced. (In this year the Colony laws were revised the third time.

C. & P. Law  
93, 94.

§ 8. *Chancery court*, A. D. 1685, to provide against "the rigor of the common law," and to prevent numerous applications to the General Court, which, it seems, exercised all chancery powers, and to expedite justice, this General Court passed an act to establish a court of *chancery*, to consist of the magistrates of each county, being, as recited, annually chosen by the freemen; and this court was authorised upon bill of complaint, or information, "containing *matter of apparent equity*, to grant summons or process" to the deft. or witnesses; to examine parties and witnesses by interrogatories upon oath; and on a full hearing and consideration, this Chancery Court had power to make their decree and determination according the rule of equity, *secundum equum et bonum*, and to grant execution thereon;" but in every case the party dissatisfied had an appeal to the next court of assistants, filing reasons of appeal as in other cases; and the magistrates

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appealed from, had a right to give the reasons of their judgment below, while sitting in the Court of Assistants, but not to vote in this court. The decision in this court was to be final, except in some great cases an appeal lay to the General Court; and generally, that might order a review in the County Court, with a second appeal to the Court of Assistants.

C. & P. Law,  
199.

§ 9. By an act passed in 1645, a party in an inferior court might review, on any new evidence or matter, in the same court, and then, if dissatisfied, might carry his cause to the General Court; but in that no cause between party and party could first be tried.

§ 10. From this sketch, it will be seen on what principles the Colony courts were established; and it will be observed, that no care was taken to keep the legislative, executive, and judicial powers distinct and separate; and it will also be observed, that near all the judges were annually elected, especially the *assistants*, called the *magistrates*, and the deputies, who, generally in the last resorts, administered the *judicial* powers of the government; but notwithstanding these and some other defects, justice was well administered by these courts, because it was administered by men, and among a people, of sound morality, who had, to guide them, the sound principles of common law. Our attention is naturally excited to see how a people destined to be great, commence their judicial system; they had one guide that rarely errs, "a heart and conscience right towards God and towards men."

ART. 10. *Massachusetts Provincial Courts.*

§ 1. As these were of a character between those of the Colony already considered, and those of the Commonwealth to be considered in the next article, it may be sufficient here very briefly to notice them. These were established under the charter of William & Mary of 1691, and by certain statutes passed whilst that charter was in force, and the constitution of the Province.

Charter of  
W. & M. of  
1691

§ 2. By this charter the Provincial legislature was empowered "to erect and constitute judicatories, and courts of record, or other courts, to be held in the name" of the king, to hear try and determine, "all manner of crimes, offences, pleas, processes, plaints, actions, matters, causes, and things whatsoever, arising, or happening within our said Province or territory, or between persons inhabiting or residing there;" "and for the awarding and making out execution thereupon." By the same charter the governor, for the time being, with the council or assistants, had power to "do, execute, and perform, all that is necessary for the probate of wills, and granting administrations for, touching, or concern-

ing, any interests or estates which any person or persons shall have within our said Province or territory." But any party dissatisfied with the decision of a Provincial court in any personal action of the value of £300 sterling, or more, might in fourteen days after sentence in such court, appeal to the king in his privy council, giving security &c.; and, as before stated, the admiralty jurisdiction was reserved to the king; and the governor and council were also, in the Province, the court to decide all disputes as to marriage and divorce.

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Prov. acts,  
1692 & 1755

§ 3. *Superior Court.* In pursuance of the above power, the Provincial legislature, in 1692, instituted "a Superior Court of judicature over the whole Province," to be held "by one chief justice, and four other justices;" three of them to be a quorum; and they had jurisdiction and "cognizance of all pleas, real, personal, or mixt, as well in all pleas of the crown; and in all matters relating to the conservation of the peace, and punishment of offenders, as civil causes, or actions between party and party; and between their majesties and any of their subjects" &c.; and to hear, give judgment, and award execution thereon. This was also a court of assize and general gaol delivery. The plt. had liberty to begin his suit in this court or in the inferior court, as he pleased; and if he begun it in this Superior Court, the party losing had liberty to review once in the same court; but no action of less value than 40s. could be commenced in the inferior court, or in the Superior, of less than £10, except where the freehold came in question; or upon appeal.

Provincial  
statute of  
1692 and of  
1699.

By the act of 1699, the powers above vested in this court were recognised, and this act also authorized it to hear and determine all actions &c. brought before it by appeal, review, writ of error, or otherwise; and generally to take cognizance "of all other matters, as fully and amply, to all intent and purposes whatsoever, as the courts of King's Bench, Common Pleas, and Exchequer, within his majesty's kingdom of England, could do; and this court as well as the Common Pleas, had power given in 1699, to fill up the petty jury *de talibus circumstantibus*. This reference to the three important courts in England, makes it very material to find what were in 1699, the powers and duties or jurisdictions of these three courts, in ascertaining the powers and duties of our Provincial Superior Court; and as of this, by act of February 20, 1781, our present Supreme Judicial Court, was made the successor; hence, it also has the powers those three courts had in 1699, though it may be a question if any of these three courts then had any powers capable of being exercised in this State, which were not given to our Supreme

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Judicial Court, by the act of July 3, 1782, hereinafter mentioned, the expressions of which are very full and comprehensive. If there be any doubt, it is in this: the Court of King's Bench is the *custos morum* of the realm; perhaps there are no expressions in our said act of 1782, so comprehensive as this; and see art. 17 and 18 this chapter; thus the powers of this court were derived from many sources, by no means well defined, and its powers and duties are still more uncertain, since a portion of them, not well defined, has been transferred to the Federal courts.

§ 4. *Inferior Court of Common Pleas.* By the same act, and one passed in 1699, this court was established in each county, to be held by four justices, duly appointed and commissioned, three a quorum: their power, to hear and determine "all civil actions arising or happening within the same" county, "triable at the common law, of what nature, kind, or quality soever; and upon judgment given thereon, to award execution;" but the party cast had an appeal to the next Superior Court, from the verdict and judgment. The case there to be finally tried; or by a new process the cause might be reviewed once in the Common Pleas; and the party aggrieved on the review might, in ten days, "bring his writ of error for the trial of the said case, at the next Superior Court in the county, and there the decision was final. Appeal regulated &c. from the proceedings on the writ of error, security to be given to prosecute the appeal or writ of error "with effect, and abide the order of the court;" and on the appeal, each party allowed "the benefit of any new and further plea or evidence," and the appellant to file the reasons of his appeal in the court appealed from, fourteen days before the sitting of the court appealed to. This Court of Common Pleas was held four times a year, and when the Sessions was held, and at the same place; and its process ran through the Province, and was summons, *capias*, or attachment; but no action under the value of 40*s.* could be brought into this court, unless where freehold was concerned, or an appeal from a justice of the peace.

*General Sessions of the Peace.* By the same act of 1692, and an act of 1699. This court was established in each county, to be held four time a year, by the justices of the peace of the same county; empowered "to hear and determine all matters relating to the conservation of the peace, and punishment of offenders, and whatever is by them cognizable according to law." Numerous powers were vested in this court from time to time, by many statutes. By the act of 1699, the deft. was allowed his appeal to the next court of assize &c.

See art. 13.

§ 5. *Courts of justices of the peace.* By the same act these courts were established, and therein "all manner of trespasses and other matters not exceeding the value of forty shillings, wherein the title of land is not concerned," might "be heard, tried, adjudged, and determined;" that is, "by any of their majesties justices of the peace of this Province, within the respective counties where he resides." Mode of proceeding prescribed: execution was a warrant of distress against the deft's goods and chattels, and for want of them, against his body; costs for the party prevailing against the party cast; and the justice was "required to keep fair records of all his proceedings;" and the party cast had liberty to appeal in civil actions, to the next Inferior Court of Common Pleas in the county, and the deft. to the Sessions, in criminal suits, giving security to prosecute his appeal "with effect, and to abide the order" of the court appealed to; and each party was "allowed the benefit of any further plea or evidence;" and if on such plea or evidence, the first judgment was reversed, the appellant has no costs for the first trial.

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And by the same act it was provided, "that all matters and issues in fact, arising or happening within the said Province, shall be tried by twelve good and lawful men of the neighbourhood;" and no person could be a juror but one who had a freehold of 40s. a year, or personal estate of the value of £50; and jurors for each court were elected out of the whole number qualified to serve, in a meeting of all so qualified in the town; and there was no ceremony in taking oaths by jurors, justices, witnesses, or otherwise, but by "lifting up the hand as has been accustomed." Each court had power to make necessary rules and orders: no proceedings to abate &c. for circumstantial errors, as above stated; and all to be in the English tongue. By an act passed in 1742, it was made no longer necessary to file reasons of appeals except in probate causes.

§ 6. *Court of Chancery.* This same act provided for this court in the Province, with full chancery powers to be held "by the governor, or such other as he shall appoint to be chancellor, assisted with eight or more of the council;" but no evidence is found to shew that this court was ever organised. The justices in any of the above Provincial courts had power, where the forfeiture of any penal bond was found, "to chancer the same unto the just debt and damages." By this act the appeal to the king was not confined to personal actions. In 1693, another act was passed, but not executed.

Thus in 1692 and 1699, our courts were established on

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the principles on which they in substance remained to the close nearly of the eighteenth century, and such were in substance the courts in the Colonies and Provinces generally, become the United States. In several, however, beyond New England, a court of chancery was in fact established and continued.

§ 7. Sometimes special courts existed by commission to try piracies, robberies, and other crimes committed on the seas.

Probate act  
of 1719 &c.

§ 8. By an act passed in 1719, the proceedings of the judges of probate, and of the probate courts, were regulated and placed on those grounds on which they have been since substantially continued; but in connexion with said clause in the charter of W. & M. above recited.

Mass. acts,  
July 3, 1782.

ART. 11. *Massachusetts Commonwealth's courts.*

§ 1. These were established in July, 1782.

Maine act,  
c. 54, 56, 58,  
69.

§ 2. *Supreme Judicial Court.* By Massachusetts declaration of rights, it is declared that the judges of this court shall "hold their offices as long as they behave themselves well;" and that they have honourable salaries ascertained and established by standing laws. By the constitution, ch. 3, a. 1, "the governor, with consent of council, may remove them upon the address of both houses of the legislature;" and (art. 2,) each branch of it, as well as the governor and council, may require their opinions upon important questions of law; and ch. 6, a. 2, they can hold no other office or place under the State, or any other State government, or power; nor can they be State senators, representatives, or counselors. They take the usual oaths.

Altered by  
the amend-  
ments in the  
constitution,  
1821.

Mass. act,  
July 3, 1782.

§ 3. By this act this court is instituted and established to consist of one chief and four other justices, inhabitants of the State, appointed and commissioned by the governor, with advice of council; they, or any four or three of them, to form a court. Its power extends to "all civil actions between party and party, and between the Commonwealth and any of the subjects thereof," brought before them, "by appeal, review, writ of error, or otherwise;" also to "all capital and other offences, and misdemeanours whatsoever, of a public nature, tending either to a breach of the peace, or the oppression of the subject, or raising of faction, controversy, or debate, to any manner of misgovernment, and every crime whatever against the public good; and shall by virtue of their offices, be severally conservators of the peace throughout the Commonwealth:" to punish according to statute law, and where there is no statute, according to common usage and practice: to bring before them "by *certiorari*, or other legal methods, indictments, or other criminal prosecutions pending in, and

records of sentences, orders, decrees, and judgments of, any court of inferior criminal jurisdiction, and to proceed, order, and award thereon, as shall be by law provided and directed:” to administer oaths, and “to punish at the reasonable discretion of the court, all contempts committed against the authority of the same;” and to issue writs of *mandamus* and *prohibition*, as above stated: to admit attornies, appoint clerks, adjourn, &c.

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§ 4. By this act this court is made the “Supreme Court of Probate,” and has original jurisdiction where any judge of probate is a party or interested; and appellate jurisdiction in all other probate matters.

Mass. act,  
March 12,  
1784.

§ 5. By this act this court has power to hear and try all questions of divorce and alimony; before decided by the governor and council.

Mass. act,  
March 16,  
1786.

§ 6. By this act, the Supreme Judicial Court was empowered to take cognizance of all matters cognizable by the said Superior Court of the Province and Court of Assize, unless directed otherwise by the constitution or laws.

Mass. act,  
Feb. 20, 1781.

§ 7. By various other statutes, powers have been given to this court, from time to time, on many particular subjects, mentioned under their respective heads, as to license the sales of estates, to bail in certain cases, to grant reviews, &c. &c.

§ 8. Since 1796, several material alterations have been made in the organization of this court, though no material alterations in its powers. By this act, after August 1, 1797, the clerks of the Common Pleas, in their respective counties, were made the clerks of this court, and the keepers of “the records of the doings and proceedings of the said court, in their respective counties;” so that since that time the records of this court in each county, generally have been kept in the county: but it has had a circuit clerk to attend it generally on its circuits, who has had power to give all necessary directions to these county clerks, subject to the control of the court.

Mass. act,  
March 11,  
1797.

§ 9. By this act, the justices of this court were increased to seven, and any three of them made a quorum to hold a court, and to discharge “all the duties thereof;” was divided into two circuits, the eastern and western, Suffolk excepted; the new arrangement took place September 1, 1800. This act enabled these justices to hold two courts at the same time, and each to all intents a supreme judicial court. Hence arose some very contradictory decisions of the same court.

Mass. act,  
March 4,  
1800.

§ 10. By this act two of the said justices were empowered to hold the court, instead of the three, whenever one of the three could not attend, by reason of sickness, or accident, or was interested, or related to a party, or had been counsel in the cause.

Mass. act,  
March 7,  
1801.

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Mass. act,  
Feb. 29,  
1804.

§ 11. By this act the justices of this court were reduced to their original number of five. This act appointed the law terms in the several counties to be held by all the said justices, but any four of them might constitute a quorum, or any three, if two were unable to attend, by reason of sickness or other personal disability. This act also appointed the *nisi prius* terms or sittings in each county, to be holden by one or more of the said justices. The 5th section of this act authorized bills of exceptions to the opinions given at the courts or terms held by two or one of the said justices; and section 6th directed indictments for capital offences, motions for new trials and appeals from probate decrees, to be tried by three or more of the said justices. This act was limited to three years.

Mass. act,  
March 8,  
1804.

§ 12. This act provided for the appointment of a reporter of the decisions of this court to be annually published; removeable at the pleasure of the executive.

Mass. act,  
March 15,  
1806.

§ 13. This act repealed the act of February, 1804, and established a court of one chief and four other justices, and no more; and appointed in each county the law terms to be holden by three or more of the said justices; also the terms to be holden by one or more of them, and provided for bills of exceptions at those holden by one justice; section 6th provided that all indictments found for a capital offence; and all motions and petitions for a new trial, and all appeals from probate decrees, and all questions of divorce and alimony, and all questions of law on statements of facts agreed by the parties, or special verdicts, and all issues in law, should be heard, tried and determined exclusively in the law terms, to be holden by three or more of the said justices; and that all other matters be heard and decided by one or more of said justices &c. either at the law terms, after the law cases are decided, or at the other terms. Section 9th provided that the appointment of clerks, and the establishment of rules of practice, and admission of attorneys, should be by the full court exclusively. By an act passed 1820, one judge can try causes of divorce.

§ 14. In each of these numerous changes, in less than ten years, a long act was passed, only the most material principles of which can possibly find place here. This court has jurisdiction in civil and criminal causes: and, 3. Partially of questions in equity: 4. It superintends inferior courts, and revises their doings: 5. It finally construes all State law that does not involve in it a construction of Federal law, so as to involve in its decision a construction against this Federal law; but it is not true (as has been said) that this court is "empowered to supervise and reprehend the other two branches of the government."

**ART. 12. Court of Common Pleas.**

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§ 1. This court was established by this act in each county, to be held by four justices, inhabitants of the county, appointed and commissioned by the governor, and during good behaviour, three of them a court, and have cognizance of all the matters the said inferior court of Common Pleas had; and process, appeals, and proceedings established, in substance, as in that court, as above stated; except by this act it has no jurisdiction of actions under £4. originally.

Mass. act,  
July 3, 1782.

§ 2. By various statutes, passed from time to time, the powers and duties of this court have been extended on many particular subjects; as usually seen in treating of those subjects, as, to license the sales of real estate, receive the reports of referees, appointed before justices of the peace; to grant reviews and appeals in certain cases; as to the removal of paupers, bonds of sheriffs, apprentices, flowing lands, &c. &c. This court remained as it was constituted, nearly, till June, 1798.

Mass. act,  
March 11,  
1784.

§ 3. These acts provided for the appointment of a chief justice in certain cases, and three other justices; but did not vary the powers or duties of this court. Mass. act, March 14, 1806.

Mass. act,  
June 27,  
1798.

§ 4. By this act, the justices of this court were limited to three, wherever any one of the four ceased to be a justice; and also provided, that wherever any one or two of the standing justices could not sit or act, his or their places should be filled by a special justice or justices, duly appointed and commissioned by the governor for the purpose, and during good behaviour; such special justices had existed from the year 1784. By the 3d section of this act, were transferred to this court, all the powers and duties of the courts of general sessions of the peace, in the several counties; except "as to erecting and repairing gaols, and other county buildings; allowing and settling county accounts; estimating, apportioning, and issuing warrants for assessing county taxes; granting licenses, and laying out, altering, and discontinuing highways, and townways; and appointing committees, and ordering juries for that purpose." By section 5th, no appeal was allowed from this court, in any action founded on *simple contract*, wherein the plt's. demand exceeded not \$50, and if he demanded more, and on appeal, did not recover more in the Supreme Judicial Court, he paid costs to the deft. arising after the appeal, made by the plt., but he had double costs after the appeal, if the deft made it; and no appeal allowed on default.

Mass. act,  
March 9,  
1804.

By this act, this court has concurrent jurisdiction with the Supreme Judicial Court and Municipal Court in Boston, in larcenies, to the amount of \$100.

Mass. act,  
March 16,  
1806.

CH. 187.

Art. 12.

MASS. act,  
June 21,  
1811.

§ 5. This act authorized two justices of this court to transact the business of it, whenever the third was in a situation to be unable, or disqualified, to act. Mass. act, March 6, 1810.

§ 6. *Circuit Courts of Common Pleas.* By this act the courts of Common Pleas were abolished, and Circuit Courts of Common Pleas were established; the whole State, except Dukes county and Nantucket, was divided into six circuits, described in the act. In each circuit, this court was established, consisting of three judges, during good behaviour. This court to sit in each county at such times and places, as were by law appointed for holding the old courts of Common Pleas; any two a court &c.; "had original and exclusive jurisdiction of all civil actions, arising or happening within their respective circuits," (except such actions wherein the Supreme Judicial Court or justices of the peace had original jurisdiction); also had jurisdiction of all such crimes &c. as were cognizable by the Common Pleas; also "appellate jurisdiction of all civil actions, and of all crimes and offences where an appeal may now, by law, be made from the sentence or judgment of a justice of the peace;" and all the usual powers to award execution &c. &c. attending these principal powers. On the whole, as to its powers and duties, this Circuit Court merely succeeded the said old Court of Common Pleas. By the 4th section, any party aggrieved at the judgment of this new court, might appeal "in any real action, or in any personal action wherein any issue has been joined, wherein the debt or damages demanded exceeded" \$100, to the next Supreme Judicial Court in the county; and recognized to prosecute &c.; costs on the appeal regulated on the principles of the said act, nearly, of March 9, 1804: [this restraint on appeal was removed by an after act.] By the 5th section, this court was authorized to grant *new trials*, on the principles of the common law, at the same term, or in one year, on petition or motion, where it has final jurisdiction, or if it thinks justice has not been done. By the 6th section, one justice constituted a court, in certain cases, to call the docket, enter defaults, and for deciding questions of an interlocutory nature, and to adjourn, &c. By the 7th section, this court might direct when the grand and traverse jurors shall attend. In 1821, this court was abolished, and a court of Common Pleas throughout the State established, consisting of four judges, one judge empowered to hold a court; but the powers and duties of it nearly the same as those of said Circuit Court of Common Pleas.

MASS. act of  
1811.

§ 7. By this act of 1811, sessions' justices were made a part of this court, in part of their terms for sessions' purposes,

usually two in a year, and those sessions' purposes reserved to the Court of Sessions in the said act of March 9, 1804; and usually two sessions' justices make such part of the said Circuit Court of Common Pleas. But in the year 1819, the Court of Session was again separated, and made to consist of three justices in each county, with the powers left to it by the act of March 9, 1804.

CH. 187.

Art. 13.

Mass. act,  
Feb. 20, 1819.

ART. 13. *Court of General Sessions of the Peace in Massachusetts.*

See next art.

§ 1. This court, as it existed in the Province, has been already considered.

Mass. act,  
July 3, 1782.

§ 2. By this act, it was established in the Commonwealth in each county, and held by the justices of the peace of it, and empowered "to hear and determine all matters relating to the conservation of the peace, and the punishment of such offences as are cognizable by them at common law, or by the acts and laws of the legislature; and to give judgment, order, or sentence thereon, as the law directs, and to award execution accordingly;" thus, to find the powers of this court, and so of its substitute, we must trace the powers of it back to the common law, and to many ancient statutes, and examine a multitude of modern ones, giving this court power on many particular subjects, treated of in different parts of this work, where those subjects are considered. The warrants and process of this court issued under its seal, signed by the clerk, and ran into all the counties in the State; and any person sentenced in this court had an appeal to the Supreme Judicial Court, next held in the county, in the mode and manner prescribed by the act. This court had power to adjourn &c. and to appoint its clerk to attend it, "and to record the proceedings thereof." He was sworn, and during the pleasure of the court. By the constitution, these justices hold their commissions for seven years, and are capable of reappointment.

This court was usually held four times a year in each county, when and where the common pleas was held. In March, 1804, most of its powers were transferred to that court in the manner before stated. By 34 Ed. III. c. 1, had jurisdiction in libel cases.

1 W. B. 368.—  
Holt on Li-  
bels, 41.

§ 3. By this act the old court of sessions was abolished, and a new court established in fact. This act provided, that after September 1, 1807, "the courts of general sessions of the peace in the several counties in this Commonwealth, shall be holden by one chief or first justice, and by so many associate justices," as were assigned to each county by the act, to be appointed and commissioned by the governor &c. The associate justices were four in Suffolk, six in Essex, six in Middlesex, six in Worcester, &c. By the third section, they

Mass. act,  
June 19,  
1807.

Ch. 187. had "all the powers and privileges," and to perform "all the  
 Art. 14. duties" of the old court of sessions; but neither the chief  
 or associate justices could be appointed, or serve on any committee to lay out, alter, or discontinue any highway; also, were empowered to examine and allow any reasonable account for services done in any prosecution, for any criminal offence, where provision was not previously made. One could adjourn &c.

Mass. act,  
 Feb. 23, 1808.  
 —A new  
 court A. D.  
 1819, as art.  
 12, s. 7 —  
 See act 1822.  
 2 special  
 justices added &c.

§ 4 By this act the style was altered to "Court of Sessions," and new commissions issued. This act seems to have restored these courts to the powers and duties of the sessions before March 9, 1804, "except causes of criminal jurisdiction; and also causes relating to the support and maintenance of bastard children, and causes which by law may require the intervention of a jury in court."

1 Stra. 6—1  
 Dougl. 115.

§ 5. By the act aforesaid, this court was abolished, and its powers and duties transferred to the Circuit Court of Common Pleas. Six justices of the peace may supersede their own order *quia improvide emanavit*; and their orders are to have every intendment in their favour. *The King v. Wavel*, 2 D. & E. 666.

#### ART. 14. *Courts of justices of the peace.*

1 Ed. III. c.  
 16.—18 Ed.  
 III. 2.—34  
 Ed. III. c. 1,  
 adopted here  
 —2 East, 10.  
 —1 Bl. Com.  
 351.

§ 1. These are numerous and important in civil and criminal concerns, and deserve considerable attention. By this statute the offices of justices of the peace were created; this act enacted, "that in every county, good men and lawful &c. shall be assigned to keep the peace." By these statutes the powers and duties of justices of the peace were described; and by this, they were empowered "to hear and determine all felonies and trespasses in their counties," at the king's suit. The form of their commission was settled A. D. 1590. This appointed them all jointly and severally to keep the peace, and any two or more of them to inquire of and determine felonies and other misdemeanours, *quorum unus*.

§ 2. There was no justices of the peace in Massachusetts Colony; their offices were first created in the Province; and in that their powers and duties were nearly the same as in the Commonwealth. One fined for not returning recognisance till the second day of the court's sitting. 14 Mass. R. 205.

Constitution  
 of Massachu-  
 setts.

§ 3. By this constitution, they are appointed by the governor with advice of council, and hold their offices for seven years, liable to be removed on impeachment, or on the address of the legislature to the governor. Their powers and duties are generally pointed out by statutes, State and Federal. These are very numerous, giving them powers on par-

tical subjects, too many to be here noticed. But a few statutes point out their principal powers and duties. CH. 187. Art. 14.

§ 4. This act describes their powers in civil causes, (former acts revised nearly.) By this act one justice may hear and determine all debts, trespasses, and matters not exceeding £4, (before £2;) and by act of March 12, 1808, \$20;) and where-in the title of real estate is not in question, within his county, and he may grant summons, *capias*, or attachment, to some proper officer in the county. There is no jury in his court: where the deft. is defaulted the charge against them is deemed to be true, and damages assessed and costs taxed by the justice. In trespass on the general issue the deft. can offer no evidence that will bring the title of real estate in question; and when the deft. justifies by title in himself or another, in real estate, and files his plea, the justice recognises him to the plt. in a reasonable sum, with sufficient surety or sureties to enter and prosecute his action at the next Court of Common Pleas in the county; and if he refuse to recognise, judgment is as on default; and in such case either party may appeal to the Supreme Judicial Court. Justice may adjourn his court, but cannot be of council &c.: must keep fair records: may execute the judgment of another justice in certain cases &c. An appeal lies from his judgment to the Common Pleas; and he may proceed on *scire facias* against bail. Mass. act, March 11, 1784.—Maine act, ch. 76, and Maine act as to clerks, their bonds &c. ch. 90.

§ 5. This act describes a justice's power &c. in criminal causes: it enacts, that it shall be his duty and within his power in his county to punish by fine, (by act of January 29, 1795) not exceeding 20s. for assault, or striking, or breach of the peace; and by the larceny act of March 15, 1785, try thefts under 40s.; and he may hear and decide as to "all assaults and batteries that are not of a high and aggravated nature, and may cause to be stayed and arrested all affrayers, rioters, disturbers, and breakers of the peace, and bind them by recognisance, to appear at the next Supreme Judicial Court, or to the Court of General Sessions of the Peace" of the county, at his discretion; and also to require security for keeping the peace, and being of the good behaviour until the sitting of the court &c., and to commit those who refuse to recognise and find security; and may inquire into all homicides, murders, treasons, and felonies done in his county, and commit to prison all persons guilty, or suspected to be guilty of manslaughter, murder, treason, or other capital offences, and hold to bail all persons guilty, or suspected to be guilty of lesser offences, not cognizable by a justice of the peace, and require surety for the good behaviour of dangerous and disorderly persons; to take cognizance of, or examine into all Mass. act, March 16, 1784.—Mass. act, March 16, 1785.—Maine act, ch. 76.

CH. 187.  
Art. 14.



other crimes, matters, and offences, which by particular laws, are put within his jurisdiction; and from his sentence an appeal is allowed for the debt. to the Court of Sessions &c.

§ 6. The powers, also, of justices of the peace, are designated in their commissions, in the Massachusetts form. By this a justice is appointed to keep the peace, and to cause to be kept the laws made for the good of the peace, and for the quiet rule of the citizens in the county, and to punish those who offend against the said laws, according to the form and force of said laws; and to have before him all those who break the peace, or attempt any thing against the same; or that threaten the citizens in their persons, or in burning their houses, to be bound to the peace and good behaviour, or to imprison &c.; and while the old court of general sessions of the peace continued, there was another clause in this commission, authorizing any three of them, *quorum unus*, to hold a court of sessions, and to inquire into and determine, "all thefts, trespasses, riots, routs, and unlawful assemblies;" and other misdeeds and offences in the county, according to the laws.

For the true principle of construction of the powers of justices of the peace, see 1 Burr. 245, cited a. 16, s. 3.

Wood v.  
Parsons.—1  
Mass. R. 489,  
Common-  
wealth v.  
Foster & al.

As to the powers of the justices of the peace; in *quare clausum fregit*, see Wood v. Parsons, Ch. 172, a. 4; and Massachusetts act, June 22, 1797, Ch. 172, a. 5; see recognisances and bail, Ch. 150. Justice has no power to direct his warrant to a private person; the court will not suffer them to be harassed under colourable pretences. Lofft, 38, 56.

A justice of the peace cannot issue his warrant, or sit as a judge, where he has the minutest interest; but he may act ministerially in some few cases. 10 Mass. R. 356; 2 Haw. P. C. c. 13, s. 20; 1 Salk. 396; Cro. Car. 211; 1 Stra. 413; 13 Mass. R. 324, 356, Pearce v. Atwood.

§ 7. A rigid adherence to form before a justice is not required; see Ch. 188, a. 2, s. 14: how he must recognise; Ch. 150, a. 8: not obliged to receive a special plea or file a bill of exception &c. when matter of law is proper, to state facts; and it is improper to plead double before him; Ch. 137, a. 4, s. 6: as to pleas in *clausum fregit* before him; see Ch. 79, a. 10, s. 24: as to bail; Ch. 150, a. 8, s. 12; Ch. 189, a. 3, s. 24; Ch. 150, a. 8, 14.

Kirby, 180,  
Gilbert v.  
Rider.

§ 8. *His jurisdiction; decided cases; Connecticut.* May issue his execution to all parts of the State; and this is at his discretion; but is liable to damages if directed to a distant officer merely to vex and oppress the debtor.

A justice living in a town interested may in a case of bas-

tardy on the selectmen's complaint, recognise the accused to appear at the county court. 1 Day's Ca. 276, *Davis v. Salisbury*. CH. 187. Art. 14.

If a justice has no power to try a party for a crime, he has none to award him to pay costs of examination, when the evidence is not sufficient to subject him to trial. Kirby, 362, Scott's case.

A justice has power to take a confession and give judgment thereon, for a debt not exceeding £20; but can award costs but for his own fee for taking the confession, unless it arose on a prior process; and this must appear by the record: is in all cases except above £4, and titles to lands. Kirby, 236, Wiler v Fowler.— Kirby, 199.

§ 9. *His power to adjourn his court &c.* Further, if one arrested for a bailable offence be brought before him for examination, may adjourn at his discretion, and may recognise him with sureties to appear; and if he neglect to appear, he may call him and his sureties, and on default, make the proper entries; but need not adjudge the recognisance is forfeited. 4 Day's Ca. 98, *Potter v. Kingsbury*.

§ 10. His previous opinion on a question of law does not disqualify him to judge in the cause when on a general principle of law; and it is not material to his jurisdiction, the parties or cause be of this or that description, if title to land be not concerned, and the demand exceed not £4. Kirby, 190, Wilson v. Hinckly.

§ 11. No demurrer to evidence before him, and if there be one he need not decide upon it. Kirby, 352.

§ 12. Most of these decisions, though made in a particular State, were made on those general principles of law, that make them authorities generally in other States.

A justice cannot reject evidence, or act from his own personal knowledge of the truth of the facts. 10 Johns. R. 250, 261.

The court will not reverse his judgment where some evidence appears, merely because it is too light to support a judgment. 1 Johns. R. 504.

He may appoint a guardian *ad litem*. 2 Johns. R. 192.

The sessions has power (24 Sess. ch. 70, s. 11) to try larcenies, where the value of the property stolen is less than \$12,50. Hence, therein it is necessary to state the value of the property stolen. 4 Johns. R. 292, case of Powers.

§ 13. *Justices courts in New York.* Select decisions as to them, made on those general principles that make them authorities in most of the other States.

§ 14. *His jurisdiction.* He has none in regard to a tavern kept in his house and for his benefit, though the license be in another's name, living in it also; nor any under the Debtor act. Confessing judgment in his court does not give it juris- 2 Caines' R. R. 180, Jones & al. v. Reed —1 Cain. R. 598 —3 Caines' R. v. Sanford

129, *Coffon v. Tracy*.—3 Caines' R. 174, *Stillson*

CH. 187.  
Art. 14.

2 Caines' R.  
213, The  
People v.  
Wright.—9  
Johns. R.  
135, 136, Mc  
Instry v. Tan-  
ner.—9  
Johns. R. 366.  
—Bowditch  
v. Salisbury,  
9 Johns. R.  
369.

diction in a suit by an executor, as consent cannot confer jurisdiction. He has jurisdiction, if no one count in the declaration be for more than \$25, and the declaration concludes within that sum, though the sums in the several counts put together exceeds that sum; nor will his judgment be erroneous on account of any technical informality in the pleadings, where it appears from the whole record that he has fairly tried the cause: has none to grant a warrant for a crime committed in another State.

The court will presume the justice acted under a regular commission, on a return to a *certiorari*, though it be objected he is a minister of the gospel, and hence the proceedings *coram non judice*; and in such case the court will overrule the objection: has jurisdiction if the plt. claim only \$25, though the balance of accounts and the several notes he declares on, amount to \$100, or more: so he has jurisdiction of an action of debt against a sheriff, for an escape; Jansen v. Stoutenburgh: none if the accounts of both parties be \$200; 9 Johns. R. 224.

9 Johns. R.  
354, Kittle v.  
Baker.—2  
Caines' R.  
134.—3  
Caines' R.  
166, 171,  
Colden v.  
Dophin.—2  
Johns. R. 192,  
Gamage's  
case.

§ 15. *His power to adjourn his court.* He may on the return of a summons, at the plt's. request adjourn for six days, without requiring an oath of the absence of a material witness; see also 9 Johns. R. 366: he may continue his court from day to day; Day v. Wilber: he adjourns his court for more than six days, this cannot be averred for error by the party at whose request it was done; but may be by the other party; 9 Johns. R. 133: deft. appeared at the day; waives any objection to an adjournment &c.; Id, 364; 7 Johns. R. 381, 529.

3 Caines' R.  
152, King v.  
Fuller.

§ 16. *Pleadings in his court not rigidly subjected to technical rules.* As if a plt. allege that he "let" the deft. have a horse, in consideration of which the deft. "let" him have another; this is well enough, and sufficiently shows an exchange, and not a bailment; and if in his court a former trial be pleaded in bar, and the plea so states the trial, that it appears according to technical pleading, it could not embrace the bar, the matter so pleaded will be rejected as surplusage; and see Stillson v. Sanford, s. 14; and a declaration for damages, "on account of not fulfilling a contract for a lot of land," in a certain place, is well enough. Special pleadings in his court are not to be countenanced. In trover the deft. justified as to the merits, and the justice decided it amounted to the general issue; and a trial was had, and judgment, and this affirmed on error, as it did not appear from the record but that the whole merits were tried by the jury; but if the declaration be for \$10, and the judgment for \$15, it is erro-

3 Caines' R.  
219, 275.

1 Caines' R.  
593, 601.

neous; nor can he admit a plt. to be sworn and to testify in his own cause: declaration must shew the cause of action. CH. 187. Art. 14.

§ 17. The court will not grant a rule on a justice to return and state the manner in which the jury conducted in his court: issuing a warrant or summons commences the suit before him. 1 Caines' R. 486.—3 Caines' R. 106, 183.

§ 18. *What a discontinuance in his court.* He issued his warrant, and return *cepi corpus*, and the plt. did not appear, yet the justice gave judgment for him for the amount of his note, the deft. gave him, on which a request to enter judgment, was endorsed, and which was delivered to the plt. by a third person. Held, the plt. discontinued, as he did not appear or any one for him. Judgment erroneous. 9 Johns. R. 140, Sprague & al. v. Shed, Id. 352.

§ 19. A justice has no power to discharge a prisoner on execution, without a special power from the plt. for that purpose. Case for an escape, against a constable, brought before a justice. The execution was not produced, but its contents were proved by parol evidence: held, no error, as this was not objected to at the trial. 9 Johns. R. 146, Van Slyck v. Taylor.

§ 20. A justice's judgment, how it bars one who had a defence; as where B sued A, on a note illegally obtained, and recovered. A then sued B, before another justice to recover back the money; and held, he was barred; for he should have shewn this matter of defence in the first action. 2. Monies collected under a regular judgment, cannot be recovered back in a new suit, on the ground that evidence has been discovered of a good defence, which existed before the judgment. 9 Johns. R. 232, White v. Ward & al.

§ 21. *Further matters in a justice's court in New York.* A plt. may withdraw and be nonsuited, before the jury return their verdict; 5 Johns. R. 346. Though a corporation cannot be sued in it, yet it may sue; 347: 7 Johns. R. 356. He cannot render judgment unless the deft. appear, or is duly summoned; 6 Johns. R. 126. Deft. may waive his trial by jury, by going to trial before the justice; 7 Johns. R. 198. All objections to a *venire* issued by him, ought to be made before the trial; 3 Caines' R. 275.

§ 22. *Justice's court in New Jersey.* In this court, as in New York, there is a trial by jury; but where the state of demand filed before the justice, exceeds in amount \$100, he has no jurisdiction of the cause. He must enter in his record the nature and style of the action; and the state of the demand must contain a lawful cause of action. It is enough the state of demand contains a plain legal charge, without being drawn up with skill. To demand for trespass, and nothing more, is bad; and no legal state of demand. The tres-

1 Penning. 53, Sayre v. Scudder.—Id. 55.—1 Penning. 101, Lewis v. Albertson.—Id. 86.

CH. 187. pass committed must be stated with convenient certainty ; but  
*Art. 15.* a state of demand in these words, " to a note which I hold  
 against him for \$20," is good.

1 Penning  
 66.—Id. 93,  
 100, Sanford  
*v. Hoover.*—  
 Id. 57.

§ 23. At the trial nothing can be proved not contained in the state of demand ; *Woodmansin v. Logan*. The plt. must file his state of demand, or exhibit it to the deft. on the return day of the summons, or be nonsuited. The return day is five days after the service of the process ; and it seems, precisely five days the deft. has to appear, so that even half an hour is computed.

1 Penning.  
 62, Layton  
*v. Cooper.*—  
 Id. 55, 95, 60,  
 102, 103.

§ 24. The constable must state in his return, how he served the process. If he arrest he must forthwith carry the deft. arrested, before the justice : he cannot enter his judgment in figures. The plt. must state the items of his account. An action must be actually pending in court for the trial of small causes, before it can be referred ; but the parties may go before a justice, and institute a suit by consent ; and judgment by default will be reversed, if the record does not show that witnesses were examined to prove the plt's. demand : and he must prove his demand in cases of default, as in other cases, or there must be judgment against him. The justice can swear no one on the jury, but such as are returned by the constable. Justice cannot issue a *venire* to summons one till the deft. appears.

Id. 106, 107,  
 134, Sulton  
*v. Coleman.*

#### ART. 15. *Probate courts.*

Case of  
 probate juris-  
 diction, Ch.  
 191, a. 4, s. 11.

§ 1. These have been established by statutes. By Massachusetts constitution, " judges of probate of wills, and for granting letters of administration," hold their offices during good behaviour ; nor can they, or the registers of probate, be members of the legislature : are appointed and commissioned by the governor &c.

Mass. act,  
 March 12,  
 1784.

§ 2. By this act these courts are established, and their powers and duties described. This appoints a probate court in each county. Its power is to prove wills and grant administration on the estates of persons deceased, " being inhabitants of, or resident in the same county, at the time of their decease : " to appoint guardians to minors, idiots, and distracted persons ; to examine and allow the accounts of executors, administrators, and guardians ; and to do such other things as authorized by law to do. It issues all needful process for the discharge of its trust, and may punish contempts of its authority, as the Common Pleas may do. This act also provides a register's office, who is the keeper of all the files, papers, and books, to the office belonging.

Courts in  
 Virginia.—  
 See Appeals,  
 Ch. 188, a. 6.

The fourth section of this act allows an appeal to " any person aggrieved at any order, sentence, decree, or denial, of

any judge of probate," to the Supreme Court of Probate, if claimed in one month by him, and he in ten days after gives bond to prosecute it with effect, and to pay intervening costs and damages, and such costs as the Supreme Court shall tax; and in ten days after the security given, he must file in the Probate Court, the reasons of appeal, and serve the adverse party or parties with attested copies thereof fourteen days before the sitting of the court appealed to; and if he fail so to prosecute his appeal, the adverse party or any one interested, may have the decree &c. below, affirmed in the court above, on his complaint filed in it. This court above may tax reasonable costs, and if the appellee fail to pay them, the appellant may have an action of debt, or sue the bond &c.; and if the appellant give bonds &c. the proceedings in the court below are stayed till a final determination is had in the Supreme Court of Probate.

CH. 187.  
Art. 15.

§ 3. By this act when a judge of probate is interested in the estate of a deceased person within his county, the same may "be settled in the Probate Court of the most ancient next adjoining county;" and all matters may be done and transacted accordingly, after public notice, however, given; and the usual appeal lies.

Mass. act,  
Feb. 16, 1811.

§ By this act it is the duty of each judge of probate to take sufficient bonds of all trustees to whom any estate is devised in trust, or for the benefit of any "minors or other persons," conditioned for the faithful performance of such trust, and faithfully to improve such estates; to make a true inventory &c.; and annually to account for the income and profits; and finally, for the estate &c. to the judge. This act is not retrospective, but in certain cases; and if the trustees refuse to give such bonds, they may be considered as refusing the trust; and the judge may appoint trustees; may order the bond sued as in other cases; and an appeal lies as in other cases in probate courts. By the act of February 24, 1818, trustees may resign or be removed in certain cases &c.

Mass. act,  
Feb. 25, 1811.

These are all our regular courts that concern the people of the State at large. We have a few other courts: some merely local; as two in Boston; and some merely occasional, as the court of impeachment, and some courts in military affairs; instituted only where there happens to be particular offenders.

In 1818, the above acts respecting probate courts were in part revised, but not materially altered, except in a few cases. These alterations are generally stated under the heads to which they apply. In Massachusetts Colony, there was no regular probate system; and in the Province the governor

Mass. act,  
1817, c. 190,  
passed in  
1818.

CH. 187. and council were the source of probate authority; and: to  
 Art. 16. them an appeal lay in all cases from the decrees, orders, sentences, and denials, of a judge of probate. See the charter of W. & M. above.

ART. 16. *Some cases of construction as to the powers of these courts.*

§ 1. When a court has jurisdiction, or not, of a cause, or when this or that process ought to issue from it or to it; whether it can legally proceed in this or that mode; when it can decide on equitable principles or not &c., are questions that frequently arise; but on particular subjects, as whether a cause is *maritime* or not; whether *error* or *certiorari* lies or not; as whether there can be an *appeal* or not; whether relief can be in *equity* or not &c.; but these are generally best considered when such particular subjects have been, or shall be, considered in their appropriate places.

§ 2. A few cases, however, may well be considered in this chapter respecting courts,—as these cases respect their powers and duties generally, rather than on particular subjects; and certain principles and maxims of law are common to all courts.

1 Burr. 245,  
 Rex v. Gayer.

§ 3. *Intendment to support justice proceedings.* In this case a motion was made to quash an order of sessions. Lord Mansfield and the court held, that these justices were not obliged to give any reasons for their opinions; because the legislature had intrusted them, upon an appeal, with the power of appointing overseers; said the court, “we must presume they have acted on proper grounds.” “It is true, that where the *whole* reason is set out, and is *clearly wrong*, their order must be quashed;” “but then the bad reason given, must appear to have been their *only* inducement.” “If there may have been other grounds, they shall be presumed sufficient, and their order shall not be set aside, because some of their reasons, unnecessarily given, appear to be bad;” and “the execution of a discretionary power, where it is not necessary to give a reason, ought to be supported, unless the whole reason is set out, and is manifestly bad;” and Dennison J. said, “we will intend every thing in favor of the justices in their order; and 2 Wils. 5. But ministerial acts must appear to be right. 8 Mod. 378.

Adams v.  
 Freeman.

3 D. & F.  
 125, Allen,  
 admr. of  
 Priestman v.  
 Dundas.

§ 4. *Judicial acts of a probate court, how respected.* *Assumpsit* for money had and received to the use of the intestate; also to the plf's. use as administrator: plea, never promised; special verdict found that Dundas, as treasurer of the navy, owed Priestman, when alive, £58 13s. 6d. for monies had and received to his use. Priestman died June 21, 1784, and August 23, 1785, one Robert Brown proved a forged paper writ

ing, dated May 8, 1784, purporting to be Priestman's will, said Brown sole executor thereof; and *the probate issued in due form of law, under the seal of the court*, the same day; Dundas thereon supposing Brown to be the rightful executor, on his request, paid him said £58 13s. 6d., all Dundas owed &c.; 1787, on citation and due proceedings, the said will and probate were declared null and void, and that Priestman died intestate; and in 1788, administration of his goods &c. was granted to Allen, the plt., who brought this action against Dundas, on the ground he had paid to Brown the money on a forged will, and so the payment was void.

§ 5. But judgment for the debt, Dundas, on the ground the payment was good; and this on the ground that a probate of a will, so long as it remains unrepealed, cannot be impeached in the temporal courts; for here, said the courts, *the probate was a judicial act of a court, having complete jurisdiction over the subject matter*; and it was immaterial whether Dundas paid the money to Brown, by the coercion of a suit or not; the debt. at the time could not have questioned the executor's authority; and it was such as a court of law was bound to enforce. As to the will of a living person, the court of probate has no jurisdiction; and the court further said, that the "distinction is, where courts have jurisdiction, their sentence, as long as it stands unimpeached, shall avail in all other places; but where they have no jurisdiction, their whole proceedings are a nullity;" but you may say, the probate seal is forged, or that there are *bona notabilia*, for that confesses and avoids the seal; but you cannot be admitted to say, *another is executor*, or that the testator was *non compos*, or that the *will was forged*; for the ordinary is judge of these things; they are his acts, and his acts are conclusive, and the party is estopped to falsify them till set aside by the probate court. Held, a prisoner cannot be convicted of forging a will, while the *probate of it remains*. A. D. 1704, a like trial was postponed till the probate court should decide; 1 Burr. 421; only the probate of the will is produced in the temporal court, which, *till repealed, is conclusive against all the world*. There seems, in several books, to be a distinction between a repeal of a probate or of administration on an *appeal*, and on a *citation*; if on an *appeal*, which suspends the administration &c., all acts, after such suspension, are void; but if on a *citation*, all the acts of the administrator &c. are good, as the *citation* does not suspend.

§ 6. These probate cases also go on a general principle, stated by Lord Mansfield and the court, above, namely, when a court *does a judicial act, having jurisdiction of the subject matter*, it binds all other courts till repealed by that court (where

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1 Stra. 481,  
Rex v. Vincents; Rex  
v. Goodrich.

Finch, 40.—  
6 Co. 18 B.—  
1 Lev. 158.—  
2 Lev. 90.—  
Moor, 396.

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no appeal by law or in fact). This principle applies to every court having jurisdiction of the subject matter, and exercises it *finally*; and if any appeal lay by law from an inferior to a superior court, but is not made, the case is as if there were no appeal by law; where the lower court decides in such case, and no appeal claimed, it decides *finally*, though by law there might have been an appeal. See Wills; see also Records and Estoppels; Error, Jurisdiction, &c.

2 D. & E.  
644, Owen v  
Hurd.

§ 7. Every court is bound to take notice, that it has no jurisdiction, and of course cannot go into the merits of the cause.

2 Haw. P. C.  
2,—6 Co. 11,  
12—4 Inst.  
87, 126, 127.  
—6 H. VII. 4,  
5.—Rd. Abr.  
361.—Sid.  
338.

§ 8. In England, all judicial power, temporal and ecclesiastical, exercised in any court whatever, is derived, directly or indirectly, from the crown, and is held by its commission; but in the United States, all judicial power whatever, exercised in every court, or in any manner, is derived from the people, as given by their constitutions, or from the legislatures, as given by their statutes. In the Colonies and Provinces, this power was derived, partly from the crown, and partly from Colonial and Provincial statutes; but even the king was bound to delegate this power according to established usages and laws; hence, the king could not empower the Court of Common Pleas to try *treason* or *felony*, or appoint a judge for *life*, wherever before appointed at *will*; and in cases in which he had authority by law to delegate power by commission, the commission was void, if not made out in the form and manner prescribed by usage or law. In the United States the commission of the president, a governor, a court, &c., in fact delegates no power, but only designates the person by name to fill a certain office, created by law, who is to exercise the powers and perform the duties annexed to it by the laws of the land; that is, by the constitutions, statutes, and common law, including usages. The judicial powers given to courts by the constitutions and statutes are fully expressed in them, but those given them by the common law are not directly expressed, but are found in thousands of decisions for centuries past. In the judicial powers derived by courts from the common law, is the great uncertainty; and as this common law, in a great degree, is common to both countries, so is this uncertainty; this runs through our whole system; for whatever may be said by some, there undoubtedly is Federal common law in the United States; for when the Supreme Court of the United States, for instance, punishes contempts, grants new trials, or issues writs of *mandamus*, *prohibition*, *procedendo*, of protection, &c., as to which there are no American statutes, to regulate the forms of proceeding in them, it must proceed by the rules

of the common law, as there are no other rules of law to proceed by of any importance; and by the 34th section of the judicial act of September 24, 1789, "the laws of the several states" are "rules of decision in trials at common law, in the courts of the United States, in cases where they apply;" where the Federal constitution, treaties, or statutes, have not otherwise provided. Now the cases are extremely numerous, in which these do not otherwise provide, but in which the State laws apply; but in these State laws are included State common law to a vast extent, derived not only from English common law and old English statutes, adopted here, in some of our Colonies and Provinces, in a greater, and in some in a less degree; but also from Colony and Province charters, statutes, usages, and customs, differing some in different parts of the Union. To find and note every case in which each court in the United States has power by force of this common law, to act and decide, is utterly impracticable; yet many general principles may be selected and stated, which will go far towards ascertaining the powers and duties of these courts; many have been already stated in preceding, and will be stated, on proper subjects, in succeeding chapters, and a few may be collected here; and in the next article, such as principles and maxims applicable to all our courts. In connexion with the said 34th section, is to be considered the obscure 2d section of the act of Congress, of May 8th, 1792, by which it is enacted, as understood by the Supreme Court of the United States, that the remedies in the courts of the United States at common law and in equity, are to be, not according to the practice of the State courts, but according to the principles of common law and equity, as defined in England. One reason, there is no uniform system of equity in the several States, in some there is no chancery court; in some, in suits at law, equitable rights are enforced; and 3 Wheat. 212, 230, *Robinson v. Campbell*.

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Act of Congress, Sept. 24, 1789.

ART. 17. *General rules of the common law as to the powers and duties of courts.*

§ 1. Every power exercised by any court must be found in and derived from the law of the land; and also be exercised in the mode and manner that law prescribes.

§ 2. No judicial power, or power to hold a court and decide causes, can be delegated in its nature; but the court must be held by the very person or persons appointed to hold it.

§ 3. Every decision, order, or decree, must be made by the actual consent of such a proportion of the judges appointed in any court, as the law of the land requires; and all judges must be held under the solemn obligation of an oath, to administer justice impartially, and according to law.

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§ 4. That the law may be settled and certain, as far as practicable, all judges are bound to respect prior judicial decisions, regularly made, and to presume the courts making them, had good reasons for so doing, where the contrary does not appear.

§ 5. No judge can be prosecuted for any *error of judgment* in any matter *judicially* decided in court by him, the law only requires of him to act and do to the best of his abilities, and with fair and upright intentions.

§ 6. It is essential to order and good government to preserve in the people respect and veneration for their judges, and for their judicial decisions; and if erroneous, to correct them in the ways pointed out by the constitution and laws; and to this end, it is always the duty of the executive to appoint as judges wise and respectable, learned and venerable men, who thoroughly understand the law they administer; and who invariably endeavour to deserve this veneration and respect.

§ 7. No man can be a judge in his own cause, even though he is sole judge of the court; nor in a cause in which he or his relations are interested, if it can any way be tried before judges disinterested.

§ 8. No judge's commission or authority, in the United States, terminates on the death or removal of the appointer, but his commission once given, is continued in force by standing laws.

§ 9. Wherever a judge of an inferior, is appointed one in a superior court, and accepts, to which an appeal or error lies from the inferior, his seat in that is vacated, on the principles of the common law.

§ 10. Every appeal claimed, and allowed, and notified according to law, from the judgment or decree of any lower court, suspends that judgment or decree, and all executions thereon, pending the appeal.

§ 11. The idea that nothing is to be intended within the jurisdiction of an inferior court, but what is expressly alleged so to be, holds only in regard to the matter which is the very gist of the suit.

§ 12. The truth of a record of a court of record, must always be tried by the record itself; and there can be no averment against the truth of the matter recorded; and, according to English authorities, every court empowered to *fine and imprison*, is a court of record, the proceedings of which can only be removed by writ of error or *certiorari*; by *error*, where it proceeds according to the course of the common law, and by *certiorari*, where not, but in a new and summary way; and a court *not of record*, cannot impose a fine, or

Co. Lit. 17.—

8 Co. 38.—3

Lev. 206.—

Co. L. 260,

117.—Salk.

200.—2 Inst.

311, 312.—

Carth. 108.—

3 Mod. 273.

—10 Mod.

133, 217, 275.

award a *capias*; so cannot try trespass, *vi et armis*, as it cannot fine. 11 Mod. 198; 8 Mod. 371; 2 Stra. 1130.

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§ 13. A court of record, as incident to it, may enjoin silence, and fine for contempts in the face of it; and so it is incident to it to protect from arrest parties and witnesses in attending, going, and returning. 10 Mod. 333; Raym. 100.

11 H. VI. c.  
12.—8 Co 38.  
—Lev. 159.

§ 14. Wherever a statute gives authority, specially, to certain persons, as to the Court of Sessions &c. on a specified application, to lay out a road &c. affecting private property, it must be *strictly* pursued, and so appear on the face of their proceedings. The very description of the persons appointed to apply, must be stated to have applied. If a particular form of notice to be given by the court &c. be specified in the act, (as in writing to the party) it must be stated, and precisely pursued. It is not sufficient to say, *due notice was given*; and defective notice is not cured by the appearance of the party. Where a court has general jurisdiction (as the Mayor's Court in New York &c.) it is not necessary to aver in the declaration the cause of action arose within the jurisdiction. 3 Caines' R. 38.

Cowp. 26, 31,  
Rex v. Croke.

§ 15. In all courts there are the same rules of interpretation of statutes, or rules by which to find the intentions of the legislature: 1. By the words to be understood in their usual and popular sense: 2. By reference to the context and laws relating to the same point: 3. As to the subject matter: 4. By the effects and consequences: 5. By considering the reason and spirit of the law, or the cause that moved the legislature to enact it.

§ 16. *Judicial decisions.* These, to be binding, must not only be by judges authorized to decide, but also *where they are judicially required to decide.*

§ 17. *Jus* of three kinds; our law courts, inferior or superior, can enforce but one; as *jus legitimum*, or legal right, and the remedy is by the ordinary course of law: 2. *Jus fiduciarium*, a right in trust, for which there is a remedy in *conscience and chancery*, but generally none in a mere law court: and, 3. *Jus precarium*, a right in curtesy, for which there is no remedy, but by petition or request to the person or court from which this precarious right is claimed.

§ 18. It is said, the rule in England is, that the superior courts at Westminster have original jurisdiction in all cases, unless *expressly* excluded by statute provisions, or *clear immemorial usage*. This is not the general rule in the United States; but here, *mere affirmative* words in a statute may give *original* jurisdiction to inferior courts of suits, described *exclusively*; as that certain actions shall be brought in the Common Pleas. The reason of the difference is,—these courts at

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Westminster, in which the king, the fountain of all judicial power in England, once sat in person, time out of mind, *had jurisdiction in all cases*; hence, it was *taking from them* to give jurisdiction to inferior courts generally; this could not be done but by express words, on the general rules of construction. But here all our courts, supreme, superior, and inferior, have been alike created by charters, constitutions, or statutes, and from these have received all their powers, and *have had none immemorially*; then when a statute gives cognizance *de novo* of certain causes to inferior courts in affirmative words, "*as that they shall have cognizance or jurisdiction*" of them, their jurisdiction is exclusive by fair construction, as to commencing the actions or suits, because the jurisdiction is given to them, *and to no other courts*; and if superior courts have jurisdiction of these causes by appeal or error &c., it is because given to them by other statutes or by constitutions in general terms; but the rule may be, as laid down in England, where the Superior Court is *previously in possession* of the jurisdiction of certain causes, and a statute is passed giving jurisdiction of them to inferior courts; here these have but *concurrent* jurisdiction. In this case jurisdiction is *not taken from the superior courts, but by express words, or clear implication*; but in the former case, of power given *de novo*, no original jurisdiction ever was in the superior courts, and the grant of cognizance is merely to the inferior courts; on such grounds the decision in the case the Commonwealth v. Johnson, article 19, this chapter, may be supported.

If prisoners of war commit murder, or other crimes, *malum in se*, they may be tried in the *municipal* courts, where the crime is committed; Suffolk, August term, 1780, Government & People v. M'Gregory & eight others.

4 Cranch, 61,  
72, Smith v.  
Carrington.

§ 19. Error to the Circuit Court of the District of Rhode Island, and the principle established was, that the court is bound to give an opinion to the jury on a question of law, when requested, if pertinent to the issue, but not if it involve a question of *fact*: 2. It seems if the court can properly separate the *law* from the *fact*, and state the legal principle, leaving the fact to the jury, yet the court is not bound to make the discrimination, but, to make this, is the duty of the counsel, and to put a mere question of law to the court, to be decided by it. 2 Dallas, 158, 195.

1 Dallas, 266,  
Robertson v.  
Vogle.

§ 20. Though it is error, if the court be requested to give an opinion on a *mere question or point of law*, and refuse, as above, (properly separated from the fact,) yet there are many cases in which it has such a wide discretion, that it is no error to refuse to do what is requested to be done, though it may misjudge, as article 7, section 15, refusing to continue a cause after issue joined, which had been more properly continued.

§ 21. Error from the Circuit Court of the District of Columbia, sitting in Alexandria; and held, the court is not bound to give an opinion on an abstract point of law, unless it be so stated as to show its connexion with the cause. 1 Cranch, 309 317, Hamilton v. Russell.

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§ 22. It is not error in the court to reject, as incompetent, admissible testimony, tending to prove a fact not relevant to the case before it; and the party is bound to show the relevancy of the fact, intended to be established, to the case before the court. The fact here was, Tindall's insolvency, not shown to be material to the case in trial. The proceedings of magistrates in cases of insolvency are in *pais*, and may be proved by *parol* and other testimony.

1 Cranch,  
116, 132,  
Turner v.  
Tindall.

§ 22. A District judge cannot sit in a circuit court, when a cause, by a writ of error, is brought to it from the District Court; of course there can be no division of opinion.

U. States v.  
Lancaster, 6  
Wheat. 484.

ART. 18. *Maxims in law, binding in all courts.*

A number of *legal maxims*, that in every court have invariably an influence and force in administering justice and right, may very properly be brought into view in this place, though some of them have been, and may be, cited on particular occasions. Maxims of law are one of the six grounds of the laws of England, according to the Doctor and Student; the other five being the law of reason; of revelation; statutes enacted by parliament; general customs, and special customs; and what is a *maxim* of law or not, and so a rule of action, or of property, or not, must be decided by the judges, and not by a jury. Id. 26.

§ 1. All expressions used by courts are to be understood with relation to the subject matter then before them. 6 D. & E. 60.

§ 2. *Qui sentit commodum, sentire debet et onus.*

§ 3. The law hurts no man; as where A is bail for B, an alien, and a statute is made by which he is sent out of the country, A is discharged, unless secured by B.

§ 4. It is better that an individual suffer a mischief, than that the public sustain an inconvenience.

§ 5. Every man is to be deemed innocent, until he is proved guilty; copied from the Roman law.

§ 6. So the maxim, that each one is to be credited in his art or profession.

§ 7. So the maxim, whatever can be reduced to a certainty, is certain. 6 Co. 54.

§ 8. *Eo modo, quo quicquid constituitur, dissolvitur.*

§ 9. *Volenti non fit injuria.*

§ 10. *Multa conceduntur per obliquum, quæ non conceduntur per directum.* 1 Bl. Com. 122.

§ 11. However wicked a man is, if he keeps his wickedness to himself, he is out of the reach of human laws.

CH. 187. § 12. It is better that many guilty men escape punishment,  
 Art. 18. than that one innocent man be punished.

§ 13. It requires the same strength to dissolve, as to create, an obligation, act, statute, or deed.

§ 14. "*Sic utere tuo, ut alienum non lædas.*"

§ 15. "One who does not prohibit, where he can do it, orders"—*lex cogit neminem ad vana et impossibilia.*

Dougl. 23. § 16. "*Qui facit per alium, facit per se.*"

§ 17. No man shall make an advantage of his wrong.

§ 18. No man shall be a witness or judge in his own cause.

§ 19. No man shall be held to accuse himself.

§ 20. *Qui prior est tempore, potior est jure.*

§ 21. If one of two must suffer, he must suffer who has not used due diligence; not he of the two, who is least in the wrong.

§ 22. All acts, in *pari materia*, are to be taken together, in deciding on the subject.

§ 23. In pleading, *via trita, via tuta.*

§ 24. *Communis error facit jus.*

§ 25. Legal fictions shall not be contradicted to let in objections of form, or to preclude a truth that is material.

§ 26. A third person shall neither suffer, nor profit, by the fraud of another.

§ 27. In *pari delicto potior est conditio defendentis aut possidentis.*

§ 28. All mercantile contracts must be construed liberally.

Moseley's R. 363. § 29. The intention of the testator must prevail, if consistent with the rules of law; the general, over the particular, intention.

§ 30. An effect must be given to all the words of a will, deed, or statute, if possible.

§ 31. *Ignorantia juris non excusat*; but by the chancellor, this maxim extends only to crimes, not to civil laws.

§ 32. The maxim, *noscitur a sociis*, has force in law, and a limitation may be explained by a similar one in the same deed or will; *quod nihil possimus contra veritatem.*

§ 33. Freight is the mother of wages, and the safety of the ship is the mother of freight.

§ 34. *Quod inconueniens est; non tutum est.*

4 D. & E. 182, Hunter v. Potts. § 35. *Quod ab initio non valet, tractu temporis, non conualescit.*

§ 36. Remedial laws are to have a liberal construction; but penal laws are to be construed strictly.

§ 37. The criminal laws of one country do not operate in another; and real estate is always governed by the law of the place where it lies; but all personal or moveable estate, by the law of the place where the owner lives, though found abroad.

§ 38. The object of all law is to establish rights and prevent wrongs.

§ 39. Every man, to do his duty to the public and to himself, must have a general knowledge of his country's laws; more especially where representation and the jury trial are very essential features in the political system.

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§ 40. Law is a rule of action, dictated by some superior power; in a more confined sense, it is a rule of human conduct.

§ 41. Justinian, Inst. 1, 1, 3, reduced the whole doctrine of law to these three precepts, to wit: *honeste vivere; alterum non lædas; suum cuique tribuere.*

§ 42. Natural law, the foundation of ethics, being dictated by the Deity himself, renders all human laws invalid contrary to it; and it is a principle of this natural law, "that a man pursue his own happiness," taken in connexion with the maxim, *alterum non lædas.*

§ 43. It is reason's office to find what the law of nature directs; and, according to Blackstone and others, the *revealed* or *divine* law, is the law of nature, expressly declared so to be, by God himself. The moral system, as framed by ethical writers, is only what, by the assistance of reason, we imagine to be natural law.

§ 44. A statute is often merely declaratory of the law of nature and reason, as in case of murder &c. and also often creates law, as when it punishes the exportation of wool &c. 4 Co. Preface, 3.

§ 45. Lord Coke makes every thing respecting law consist; 1. in making them; 2. in correcting them; 3. in digesting them; 4. in expounding them; 5. in learning them; and, 6. in obeying them.

§ 46. According to Doctor and Student, the *law of reason* P. 5, 6, 7. is written in the heart of every man, teaching him what is to be done, and what avoided; that good is to be loved, and evil fled; that you do to another what you would have done to you; do justice to all, and do nothing against truth; by it one may defend himself and goods, against an unlawful power; not according to it to have things in common.

§ 47. *Quod naturalis ratio inter omnes homines constituit, vocatur jus gentium.*

§ 48. "The law of nations," is the law of nature applied to nations &c.; "is a system of rules deducible by natural reason, and established, by universal consent, among the civilized inhabitants of the world; in all, to decide all disputes; to regulate all ceremonies and civilities, and to insure the observance of justice and good faith in that intercourse, which must frequently occur between two or more independent states, and the individuals belonging to each. This general rule is founded on this principle, that different nations ought, in a time of peace, to do one another all the good they can;

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§ 49. In the United States, as in England, the law of nations is adopted in its full extent, by the common law, and is held to be part of the law of the land.

§ 50. And the Law Merchant, part of the Law of Nations, is constantly, and every where, adhered to and recognised here.

§ 51. “So, too, in all disputes relating to prizes, to shipwrecks, to hostages, and to ransom bills, there is no other rule of decision, but this great universal law, collected from history and usage; and such writers, of all nations and languages, as are generally approved. This law of nations is of four parts,—natural, voluntary, customary, and conventional.

§ 52. *Municipal, or civil law*, is *jus civile quod quisque sibi populus constituit*, according to Justinian; Inst. 1, 2, 1; and is a rule of civil or *municipal* conduct, prescribed by the superior power in the state, commanding what the legislature deems right, and prohibiting what it deems wrong.

§ 53. And it is a rule that is permanent, uniform, and universal; not advice or counsel, a compact or agreement.

§ 54. Law depends on the maker's will, and must be obeyed; and must be made public; and its office is to fix the boundaries of right and wrong; and to declare clearly what is right and what is not; to enforce the recovery of rights and to redress wrongs, by the means of suits in the proper courts, and the sanctions of penalties.

§ 55. Laws in the United States which every court must notice, are: 1. The Colony and Provincial charters: 2. Federal and State constitutions: 3. Federal and State statutes, made in the Colonies and Provinces, and in the Republic: 4. Judicial decisions made in them all: 5. Such parts of the English common law and ancient statutes, as have been adopted here: 6. General usages, originating and grown into general customs of long standing here: and, 7. Local usages, originating in the country, and by long and constant practice, grown into local customs.

§ 56. What has usually been called the *lex non scripta*, is now generally become written law, found in written cases and reports.

§ 57. The common law is the perfection of reason; and what is not reason, says an eminent civilian, is not law, or that is not law which flatly contradicts reason.

§ 58. The “rule is precedent; and rules must be followed, unless flatly absurd and unjust.”

§ 59. *Non obstante*; this doctrine that once made so large a part of the law recognised in English courts, has had no

existence here since 1688, and but very little force or influence before. Ch. 187.  
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§ 60. That which is the property of no one, is ceded by natural reason and law to the first occupant.

§ 61. To disobey an *order of court*, is a misdemeanour at common law, and by that law indictable.

§ 62. No *proclamation* of the president, or of any governor, &c. has any binding force or influence in our courts, or otherwise, but only as it enforces the execution of *existing laws*. Hence no indictment ever concludes against his proclamation; but he may, by it, admonish the citizens to obey the laws.

§ 63. The very basis of our government and law, is the original sovereignty in the people, and the power they delegate, by the constitutions they make, to legislatures, courts, magistrates, &c. to make, adopt, and execute laws, &c. Ch. Justice-  
Jay's argu-  
ment in the  
George case,  
1793.

§ 64. Natural liberty consists in a power to do as one thinks fit, as restrained only by the law of nature.

§ 65. Political or civil liberty consists "in a power of doing whatever the laws permit." It is natural liberty, regulated by the laws of the society, for the public good. Inst. 1, 3, 4.

§ 66. Though the civil or municipal law, that restrains one man from injuring another, diminishes the natural liberty, yet it increases the civil liberty, of mankind.

§ 67. But it is oppression to restrain any man's liberty without reasonable cause.

§ 68. All cases like other cases, shall be judged after the same law as other cases be.

§ 69. *Qui amat periculum peribit in illo.*

§ 70. Two leading maxims in the law of reason, often cited by divines and moralists, as well as by lawyers in cases in equity and conscience, may have place : 1. A man shall do as he would be done to, is the law of reason and of revelation : 2. Covet not thy neighbour's goods &c.

§ 71. Justice is to be done to all men, and wrong to none ; and courts exist to preserve peace and security.

§ 72. Equity and conscience must be ruled and guided by the law, where it is clear and certain ; especially where the cause and reason of it continues.

§ 73. But conscience rules and guides, where the law is silent, or the reason of it has ceased, or where founded on a false presumption, or its decision is against the truth.

§ 74. A mischief shall be rather suffered than an inconvenience.

§ 75. Conscience is ever grounded on some law, either of reason, of God, or of man : so no one can claim a thing in conscience, but when entitled to it by one of these.

CH. 187. , § 76. When the law of man is reformed by conscience, it  
 Art. 18. is by the law of reason.

§ 77. One may be bound in conscience, in many cases, to restore property, where not held by law or *subpœna*; as when he knowingly buys land of a disseizor; gets a collateral warranty, and by it bars the disseizee &c.

§ 78. So neither law nor equity compels to be done, all one in conscience is bound to do.

§ 79. The crime consists in the intention, *actus non facit reum, nisi mens sit rea*.

§ 80. Judgment is the decision of right, and right, both in private and public cases.

§ 81. It was a good maxim in the old Roman law, that no man could be punished infamously, but after condemned, and that after a hearing.

§ 82. So the rule, the Roman prætors, or judges, should always use the same method in judicial processes, as it preserved a constant and regular course of justice, was a good one.

§ 83. "What is extorted by physical necessity, is not obligatory," as the party has not consented; otherwise, as to moral necessity, or consenting from a fear of a greater evil, and such consent is justly demanded.

§ 84. Every independent nation may lawfully forbid foreigners to come, or goods to be brought, within its dominions, and control them when there. Hence is derived the *droit d'aubaine*.

§ 85. *Quod in judicio non creditur, nisi juratus.*

§ 86. *Ex delicto, non ex supplicio, emergit infamia.*

§ 87. *Delegatus non potest delegare.*

§ 88. *Benignæ sunt faciendæ interpretationes chartarum, propter simplicitatem laicorum, ut res magis valeat quam pereat.*

§ 89. *Quoties in verba nulla est ambiguitas, ibi nulla expositio contra verba facienda est.*

§ 90. *Mala grammatica non vitiat chartam.*

§ 91. *Quando quod ago non valet, ut ago, valeat quantum valere potest.*

§ 92. *Justitia est constans et perpetua voluntas jux suum cuique tribuendi.*

§ 93. "Interest reipublicæ ut sit finis litium."

§ 94. The subjects of the Roman, as of other laws, are, 1st. Persons: 2. Things: and 3. Actions.

§ 95. *Semper in dubiis benigniora preferenda, non minus justius est quam tutius.*

§ 96. *Quæ ita sunt scripta ut intelligi non possunt, perinde sunt ac si scripta non essent.*

§ 97. *Non solent quæ abundant vitiare scripturas.*

CH. 187.

§ 98. *Si librarius in transcribendis verbis stipulationes errasset, nihil nocet.*

Art. 19.

§ 99. *Privatorum conventio juri publico non derogat.*

§ 100. *Non videntur consentire, qui errant.*

§ 101. *Nemo videtur fraudare eos qui sciunt et consentiunt.*

§ 102. An agreement to cheat is void ; nor is it right or any one to enrich himself to another's injury ; so *nemo ex suo delicto meliorem suam conditionem facere potest.*

§ 103. No one tortiously takes away a thing, who pays its full value for it.

§ 104. While a man acts according to law, it supposes he acts understandingly.

§ 105. *Fraudis interpretatio semper non consideratur ex eventu duntaxat, sed ex consilio quoque.*

§ 106. *Nemo potest mutare consilium suum in alterius injuriam.*

§ 107. *Omnia mala exempla ex bonis orta sunt.*

§ 108. "*Misera est servitus ubi jus est aut vagum aut incognitum.*" *Ei incumbit probatio, qui dicit, non qui negat.*

§ 109. Civil liberty consists in the individual's security of person, property, and reputation : political liberty, in constitutional suffrage.

§ 110. A court is not bound to give instruction in general and abstract proportion, but only on the case before them. 4 Hen & M. 82.

§ 111. The judge sits not as a legislator, but to administer the laws that he finds existing.

§ 112. "Justice is the first virtue of courts, and humanity is only the second." "The court is neither to make law, nor apologize for it."

ART. 19. *Cognizance by courts ; some cases disputed and decided*

§ 1. When a lawyer is applied to for a remedy for a wrong, his client complains of, his first question is naturally, Is the case such as that a remedy exists in law, in equity, or on petition ? This decided in the affirmative, his second question naturally is, What is the remedy, by petition, a bill in equity, or a suit at law ; a criminal or civil suit ; a real or personal action ; of this or that kind &c. ? Having settled this point, his third question naturally is, Which is the proper court in which to seek the remedy, or bring the suit &c. ; or which court properly has cognizance of this case ? This matter has been already largely considered directly under the heads of jurisdiction, abatement, error, &c., and in many parts of this chapter ; and indirectly in many cases in considering different

CH. 187. suits, where it has been usually stated or shewn, in what court  
 Art. 19. brought or instituted, and where they have been sustained and  
 decided without objection to the court's jurisdiction, it may  
 usually be taken for granted, it had cognizance of the case ;  
 and it may not be amiss here to observe, that citing many  
 authorities is in fact citing or stating the court's taking cogni-  
 zance of the suit ; for instance, in citing 1, 2, or 3, &c. of  
 Cranch's Reports, is stating a suit sustained by the Supreme  
 Court of the United States, as his Reports contain only such  
 suits : so 1, 2, 3, 4, &c. Massachusetts Reports, is stating suits  
 in Massachusetts Supreme Judicial Court : so of other reports  
 and cases.

§2. It will be readily observed, that this question, which  
 court properly has cognizance ? may be exceedingly extend-  
 ed ; but that it can be of use here to pursue it only as far as  
 there has been a real question made and decided ; and this  
 only in a few of the cases, the inquiries and decisions in  
 which have a clear and useful tendency to mark the true dis-  
 tinctions among the various courts as to their jurisdictions and  
 cognizance of causes ; and this too will be done by stating  
 cases ; and in many instances, by reference to cases already  
 stated. As to what court has cognizance of admiralty causes ;  
 see Admiralty Jurisdiction, Ch. 186.

Stra. 1256. § 3. Court of Sessions has jurisdiction of poisoning cattle.  
 See Commonwealth v. Leach & al. Ch. 75, a. 4, at common  
 law ; see Brown v. Crompton, Ch. 75, a. 3. Has none as  
 to new offences.

1 W. Bl. 369, § 4. It was decided in this case that the sessions has a ju-  
 Rex v. Ris-  
 pal.—Same,  
 3 Burr. 1320. risdiction over conspiracies, as well as of cheats and libels ;  
 —Cro. El. 601. for they tend to a breach of the peace ; but not of perjury, for-  
 —2 Salk. 680. gery, and usury. Decided on a motion in arrest of judgment ;  
 —2 Ld. Ray. and the court said, “ this offence of a conspiracy is a trespass,  
 1144. and trespasses are indictable at the sessions, though not com-  
 mitted *vi et armis*.”

2 East, 5, 23, § 5. To solicit a servant to steal his master's goods, is a  
 Rex v. Hig-  
 gins. misdemeanour, though no act but this is laid in the indict-  
 ment ; and this offence is indictable at the sessions, having a  
 tendency to a breach of the peace. Many cases cited of of-  
 fences indictable or not ; and in the sessions or not. The  
 mere “ soliciting was an act done,” though the master was not  
 robbed : so if A incite B to commit perjury, though none is  
 committed ; and in this case the whole court agreed, as it  
 did in Rex v. Rispal, that the words in the 34 Ed. III. em-  
 powering justices to take cognizance of trespasses, are to be  
 construed, as Hawkins construes them, to include not only  
 “ direct breaches of the peace, but also all such offences as  
 have a tendency thereto.”

§ 6. Indictment in the sessions 1803, for erecting obstructions to the fish in Sandy river, at Farmington ; to this court, the Common Pleas, March, 1804, became successor. Deft. was convicted, and appealed to the Supreme Judicial Court, and there again convicted ; and motion in arrest of judgment. This court held, the Sessions had no jurisdiction of an offence created by statute, unless expressly given by statute. The court referred to said act of July 3, 1782, and observed, if by common law, mentioned in it, was meant strictly the common law of England, those words could have no effect ; and as the Sessions was created by statute, can have no jurisdiction, " but what is given by some statute ;" but if they mean the " common law of the Commonwealth, they have an extensive operation, and are easily understood." The common law our ancestors brought with them &c., " was the common law of their native country, as it was amended or altered by English statutes, in force at the time of their emigration. Those statutes were viewed as incorporated into the common law. This and some more modern English statutes adopted here, and some old usages in Massachusetts, form the body of our common law, varied by statutes and constitutions ; as the sessions in England, when our ancestors emigrated, had jurisdiction of all trespasses, (" except perhaps forgery and perjury ; see 2 East's Reports, 18,") which were offences against law, when the statute of 34 Ed. III. c. 1, was passed, giving the sessions (among other things) the cognizance of all trespasses. Our sessions had " jurisdiction of the same trespasses by the common law of the Commonwealth, [that is, the trespasses intended in 34 Ed. III. ;] and had jurisdiction of no other trespasses, unless derived expressly from some statute." The offence here indicted, the erecting the mill-dam, is no offence at common law, but is a new one created by the statute of 1798 ; and by this no express cognizance was given to the Sessions ; as the presentment of the grand jury, mentioned in the act, may well be in the Supreme Judicial Court.

Every act a justice does, which he could not do otherwise than as a justice, is presumed to have been done by him as a justice.

§ 7. *Probate Court.* As to matters this court has cognizance of ; see Ch. 29, a. 5, *Gold v. Mc Mechan* ; and so the Supreme Probate Court : so Ch. 29, a. 8, *Parsons v. Mills & al.* ; also *Proctor & al. v. Atkins* ; and sundry other cases before cited. In cases of insolvency ; in assigning dower ; in making partition of reversions, on dower, &c.

*General principle.* On appeal from the courts of probate, Kirby, 284, Case v. Case.

Ch. 187.

Art. 19.

3 Mass. R. 535, Commonwealth v. Knowlton.— See 1 Johns. R. 498.—

A judge cannot take the proof of a deed out of the State ; is a witness as to the fact.

1 Salk. 91.—  
2 L. Raym. 978.—3 Salk. 284.

CH. 187. it is the office of the Superior or Supreme Court to settle the principles of law for the direction of such court, but not to proceed through the forms to complete the settlements of estates, as a prerogative court. It remands, to these purposes.

Art. 19.



§ 8. *Common Pleas.* When want of jurisdiction in this court may be taken advantage of; *Martin v. Commonwealth & al.* Ch. 131, a. 4; and since it has succeeded to the Court of Sessions in all its criminal jurisdiction, and some other matters, all the cases of jurisdiction in the Sessions, in various parts of this work, have become material in considering the powers of the Common Pleas.

Kirby, 399,  
Chapman v.  
Allen.

Common Pleas in Connecticut, sitting as a court of equity, has jurisdiction on a petition praying relief, where a bond meant as an indemnity from an execution issuing from the Superior Court, became fruitless on account of its being misdirected.

8 Mass. R.  
87, Common-  
wealth v.  
Johnson.

§ 9. Supreme Judicial Court has no jurisdiction to compel the execution of a trust; *Prescott, jun. & al. v. Tarbell & al.* Ch. 29, a. 8; Ch. 39, a. 5; Ch. 149, a. 2. Has no cognizance of offences committed in the Federal district; *Commonwealth v. Clary*, Ch. 206, a. 7. Has no original cognizance of offences against the Warden act, or act for the due observation of the Lord's day. The deft. was originally indicted, in this court, and pleaded to the jurisdiction of this court, and said, a justice of the peace, or the Common Pleas, had jurisdiction &c. Held as above, on a general demurrer to this plea. The court noticed the several powers before stated of this Supreme Judicial Court; and observed, that prosecutions of offences against the act, were, though by affirmative words, confined to the justice's court or to the Sessions; for the words in the act are, "shall be prosecuted" before the justice, or in the Sessions; and the court seemed to adopt this general principle, to wit, where a statute declares any inferior court "shall have cognizance of all civil actions," of a specified description, it has exclusive jurisdiction in the first instance. These affirmative words, according to our practice, implying a negative.

Supreme  
Court of Er-  
rors, in Con-  
necticut, has  
no power to  
grant an  
order to  
amend the  
record of  
another  
court.—1  
Day's Ca.  
19, *Perrin v.*  
*Sykes*.—See  
Ch. 95, a. 3,  
s. 4.

§ 10. *Courts in other States.* As to their jurisdiction or cognizance, see *Bessell v. Briggs*, Ch. 96, a. 4; Ch. 146, a. 1; and *Bartlett v. Knights*, Ch. 146, a. 4; Ch. 81, a. 2, and the cases therein cited.

§ 11. The courts of the United States have no cognizance of suits between citizens of different States, unless the deft. is expressly alleged to be of another State; and see *Cabot & al. v. Bingham*. Where the Supreme Court has jurisdiction or not in cases of *mandamus*; *Marbury v. Madison*, Ch. 186,

a. 2, s. 2. Jurisdiction of the District Court, as Ch. 186, a. 5, a. 6, a. 7, a. 8, a. 9, a. 10, a. 11; and so of the other Federal courts. Jurisdiction of these courts; this chapter, to article 7, included sundry cases. A justice of the peace of the District of Columbia, is an officer of the government of the United States, and exempt from militia duty; 3 Cranch, 331: and a magistrate found acting as such must be presumed to have taken the proper oaths. 4 Cranch, 76.

Ch. 187.

Art. 20.

No foreign power can institute any kind of judicature in the United States, unless warranted by treaty; 3 Dallas, 16. And the Federal courts will respect State decisions on State laws; 5 Cranch, 287, *Rush v. Parker*. In a question of jurisdiction of the Supreme Court of the United States, it gave time to procure affidavits as to the value of the matter in dispute; 288. The Circuit Court has jurisdiction in a suit in equity to stay proceedings on a judgment at law between the same parties, though the *subpoena* be served on the deft. out of the district in which the court sits. 4 Cran. 419, 432.

ART. 20. *General court or legislature in Massachusetts.*

§ 1. Its powers and duties in the times of the Colony and Province, were found generally in the Colonial and Provincial charters, now in the constitution of the Commonwealth, too numerous to be cited or noticed in this work, except where there has been some important judicial construction of them. Ch. 104, a. 3, s. 41; Ch. 101, a. 5, r. 16.

§ 2. It has no power to suspend the operation of a general law, in favour of an individual; as held in this case. On the plt's. petition, the legislature, February 15, 1813, passed resolves suspending the operation of the several statutes of limitation in suits against executors and administrators, as well as against heirs and devisees, in respect to certain claims of the plt. against the estate on which the deft. was administrator. Decided this suspension was void, being confined to the case of an individual. Plt. nonsuit. 11 Mass. R. 396, *Holden v. James, adm'r.*

§ 3. *Titles vested in settlers by resolve of the General Court.* As where it resolved, "that there be, and hereby there is released," to the several inhabitants of the township of Hampden, who settled therein before January 1, 1784, all the Commonwealth's right to one hundred acres of land, each; they causing the same to be surveyed &c.; and the surveyors to give certificates &c. Held, these made their titles good; and a deed from the committee for the sale of Eastern lands, was useless and inoperative. 12 Mass. R. 339, *Mayo & al. v. Libby, jun.*

§ 4. Held, the General Court was authorized by the constitution to pass the statute of 1812, c. 32, levying a tax on the stock of an incorporated banking company, whose charter 12 Mass. R. 252, *Portland Bank v. Apthorp.*

CH. 187.

Art. 20.



existed prior to the passing of that act. This statute enacted that the corporation of every banking company in the State, in operation on the first Monday of October, 1812, should within ten days after each semi-annual dividend which should be made by them respectively, pay to the treasurer of the Commonwealth, a tax of half of one per cent. on the amount of its original stock, actually paid in; and if any bank neglected to pay the tax for thirty days, the treasurer was directed to issue his warrant of distress &c. This bank having neglected to pay the tax, the treasurer, Apthorp, issued his warrant for levying \$1500, a semi-annual tax, on which the goods were taken, for which the bank brought this action of trespass against said Apthorp, on the ground the legislature had no constitutional power to lay such a tax on a bank incorporated, as this was, before the act was passed, and in its act of incorporation there was no condition or provision for such, or any tax: (incorporated in 1799.) No *bonus* was required when incorporated; nor any right reserved to levy a tax, or an excise, on the company. The objection to the tax, mainly was, that it was a partial tax on a particular and limited species of property; and that the General Court "is, by the constitution, limited in its power of taxation, to an equal and proportionate assessment upon all property in the Commonwealth; and that it has not the power to select any individuals, or company, or any specific object of property, and demand a tax of them, separate and distinct from such tax as might result from its equal and proportionate share of such taxes as should be required of all other individuals, companies, or property, within the Commonwealth." The power of the legislature by the constitution, is "to impose and levy proportionate and reasonable assessments, rates, and taxes, upon all the inhabitants of, and persons resident, and estates lying, within the Commonwealth; and also to impose and levy reasonable duties and excises upon any produce, goods, wares, and merchandise, and commodities whatsoever, brought into, produced, manufactured, or being within the same." This bank tax was supported under the second branch, *duties and excises*; and stress was laid on the words, *commodities* and *excise*, as of a very general meaning. The court thought the word *commodities* "embraced every thing, which may be the subject of taxation; and has," said the court, "been applied by our legislature, from the earliest practice under the constitution, to the privilege of using particular branches of business, or employment, as the business of an auctioneer, of an attorney, of a tavern-keeper, of a retailer of spirituous liquors, &c. admitted by the court not

As to courts in Virginia, see Appeals, Ch. 188, a. 6.—Ch. 177, a. 3, a. 9.

to be a "proportional tax ; nor is it an excise or duty upon produce, goods, wares, or merchandise." But the court thought, though the word *commodities* vulgarly signifies these only, yet legally it also "signifies convenience, privilege, profits, and gains, as well as goods and wares;" and under this construction, the legislature had for thirty years assumed the right "of exacting a sum of money from attornies, and barristers at law, vendue masters, tavern-keepers, and retailers." "A commodity, convenience, or privilege, which the legislature has by contemporaneous construction of the constitution assumed a right to sell at a reasonable price ; and by parity of reason it may impose the same conditions upon every other employment or handicraft." In the reasoning of the court in this case, two questionable points appear : 1. Does the word *commodity*, constitutionally signify "convenience, privilege, profit, and gains?" The court allows it does not *vulgarly*, that is, in common acceptance. In which sense, then, is a constitution made by the people to be construed ? 2 There is no doubt but that this tax may be annexed to the license, when granted, as to keep a tavern for instance, because then the licensed person accepts his license subject to the tax, and voluntarily submits to it, it is a price and a bargain ; and it will be found that almost every tax of this kind has been exacted and paid in this way, and as was the case of almost every bank in the State, in 1812, they accepted their new charters on this condition. But the real question is quite different, and is if the legislature can lay the tax on a tavern-keeper, for instance, *after* it has given him his license for a year, and to operate during that year, and after the legislature has parted with the privilege for a year, without any price, as it did the privilege to this Portland bank for twenty years ? If it can lay a new tax within the year or term, why not increase an existing tax, and so directly by the act of one party only, vary the terms of the price, as the court call it ?

§ 5. Held, the legislature has power to revoke an exemption from serving in the militia, before granted to a certain class of citizens, and to require them to do military duty. Bird, under the statute of 1793, had acquired an exemption as an officer in the militia, but by a statute of 1800, it was taken away from such officers.

12 Mass. R.  
443, Commonwealth  
v. Bird.

§ 6. The courts established in Kentucky, whilst a part of Virginia, and of course a part of the Virginia system, as it existed in the year 1792, seem to have continued with very little alteration for several years, though several statutes were enacted respecting them. In the year 1801, it appears there

CH. 187.  
Art. 20.

  
Toulmin's  
Laws of  
Kentucky,  
p. 168, 190.

were forty-four counties in the State, in each of which a county court was held monthly, consisting of the justices of the county, three of whom constituted a court; except it was not held in the months in which the Quarter Session Court was held; that was in three months each year, in each county, appointed by law; the justices allowed to hold each Quarter Session Court, were not less than two, nor more than three; the jurisdiction of the county courts extends to all causes of wills, letters of administration, mills, roads, the appointment of guardians and settling their accounts, and admitting deeds and other writings to record; the public inspections; to licensing, governing, and restraining ordinaries and tipling houses; to matters between masters, apprentices, and hired servants; to ferries and to the poor; to regulating, laying, and collection of taxes; to county buildings; prison bounds, and to appeals from a single justice in causes above twenty-five shillings each.

§ 7. *The personal liability of the members of the county courts.* "Every member of a court, which fails to keep up a sufficient prison, pillory, and stocks, forfeits 500 pounds of tobacco, one half to the State, and the other to the informer, with costs, on action of debt or information in any court of record;" the court is also liable to the action of the sheriff, for damages recovered against him, on any escape, for the insufficiency of the prison, and he, or his executors or administrators, may have debt or information in the District Court, against the justices so failing, or the survivors of them, among whom, and the executors and administrators of those deceased, the damages are apportioned by the District Court, and executions accordingly. And the court may cause a ducking stool to be built at the county's charge. They have power to tax for all these purposes.

§ 8. *Jurisdiction of the justices.* They are conservators of the peace in their counties, and have jurisdiction of all causes under £5 or 1000 pounds of tobacco; but no execution against the body for less than 25 shillings; the writ may be served by the sheriff or constable; the appeals are regulated on principles similar to those in Massachusetts, as to security to prosecute &c. The court decides in a summary way, without pleadings in writing, according to the justice of the case, as to debt and costs, and, by it, the appeal can be but once continued; and it issues execution as it would, if the cause had originated in it. Justices may summon witnesses from any county in the State.

Justices allowed in each county,—not less than five, nor more than fifteen. In 1801, there were over four hundred justices of the peace, in a population of about 230,000; the

county courts, or any justice thereof acting judicially, can punish contempts as the Courts of Quarter Sessions may: CH. 187.  
 eighty-eight county courts, one sitting each month, in each Art. 20.  
 county; that is, 1056 county courts held in a year, in this small population.

§ 9. *Courts of Quarter Sessions.* One in each county, consisting of three justices, specially appointed; any two of whom constitute a court; they sit six judicial days, if necessary; are conservators of the peace in their counties, and have jurisdiction in all causes at common law and in chancery, in their counties; but not in criminal cases of life or member, except by special statutes; nor in causes under £5 or 100 pounds of tobacco; have jurisdiction as to escheats and forfeitures in their counties; concurrent jurisdiction with the District courts, except in the trial of criminals; the court, or two justices out of court, awards writs of *ne exeat*, injunction, and *habeas corpus*; have juries &c.; decides summarily when the penalty is less than \$15; but if above, or uncertain, by jury &c.

§ 10. *District Courts.* The State divided into districts in Acts, 1798,  
 1801; in each a superior court held three times a year, sits, A. D. 1801  
 if necessary, fifteen days; are six District judges, who, themselves, allot their districts twice a year; two to each court; if one do not attend, or cannot sit, another judge may be called in, if to be had, if not, one is a court, except in cases capital or burning in the hand; has jurisdiction over all persons, and all things, at common law or in chancery, arising in their respective districts, except in cases of assault and battery, trespass, and defamation, where the demand is under £50; then only on *certiorari*; rules of pleading and set-offs as in the Quarter Sessions; this court, or any judge of it, in vacation, can grant writs of *habeas corpus*, *ne exeat*, injunction, or *certiorari*; have no jurisdiction as to *mandamus* or *certiorari*, but as to records or proceedings in the districts; nor as to *caveats*; but as to the lands therein; have jurisdiction of all treasons, murders, felonies, and other offences in their districts.

§ 11. *General Courts.* The District judges hold two annual sessions; must be three judges to constitute a court; has jurisdiction in all causes, suits, and motions, in behalf of the State, against sheriffs, clerks, collectors of public money, and all public debtors; new and difficult questions of law may be carried to it from the District courts, and decided without costs or delay; has also jurisdiction in all controversies between non-residents, and between them and citizens, in cases above \$20 value, and all cases between citizens, as to titles and bounds of lands, if the parties consent, in writing; and

Act, Dec. 21,  
 1799.

CH. 188. this on removal of causes, on petition or originally : is a court of record.

Art. 1.

Act, Dec. 19,  
1861 &c. ;  
Dec. 19,  
1796 ; Dec.  
24, 1798.

§ 12. *Court of Appeals* consists of four judges, three of whom constitute a court ; one is the chief justice of Kentucky &c. ; hold three courts in a year. It has appellate jurisdiction in cases in which inferior courts have cognizance, and issues executions ; no appeal but where the judgment or decree is final, and amounts to £30, exclusive of costs, or relates to freehold or franchise, and must be prayed for when the judgment is given, or the decree is made ; error lies of course, but only on matters of *law*, appearing on the face of the proceedings, except in cases of wills, roads, and mills, in which errors in fact may be assigned.

## CHAPTER CLXXXVIII.

### APPEALS—PLEADINGS.

3 Dallas,  
321, 330,  
Wiscart r.  
Dauchy.

*Appeals.* These are always from a lower to a higher court, as appears in the preceding chapter, 187 ; they have been allowed in Massachusetts, in various cases, from the first settlement of the country. This is a branch of our judicial proceedings almost peculiar to this State, as practised in it,—is a process of civil law origin, and removes the cause entirely, subjecting the fact and law to a review and retrial.

ART. 1. *General principles.*

§ 1. The great object of the appeal has ever been to allow the party cast, a second trial, and in a higher court ; and when, from a court in which there has been no jury, it has often been an object to allow this second trial, that the party dissatisfied with the trial below, may have the benefit of a *jury* trial, which, in all cases of any considerable importance, has ever been considered, by Englishmen and Americans, a fundamental right ; and, as it appears, Ch. 187, there always have been, from our earliest times, several inferior courts, in which it never has been practicable to have the jury trial ; and yet in these courts, interesting *legal* questions have arisen, though commonly in causes of small amount ; and as this jury trial has been held sacred, it naturally followed that an appeal was deemed proper from these inferior courts to courts in which the jury trial could be had, in order that every one

might, in some form, have his cause tried by a jury, if he wished it.

CH. 188.

Art. 2.

§ 2. Prior to the adoption of our State constitution, in the year 1780, as is seen in the next preceding chapter, certain causes under 40s. value, debt and trespass, had ever been tried in certain inferior courts, without any jury, but always with an *appeal* to either party to a court having a jury; and on every such appeal the cause was tried, as fully, and to all intents, as it would have been if there had been no such former trial of it; and, as will be observed on the appeal, every party has had the benefit of any *new* evidence, and *new* plea also; therefore, when the 15th article in the bill of rights, annexed to this constitution, was adopted, it was well understood what was meant by that article, which provided, "that in all controversies concerning property, and in all suits between two or more persons, except in cases in which it has heretofore been otherwise used and practised, the parties have a right to a trial by jury, and this method of procedure shall be held sacred, unless in causes arising on the high seas, and such as relate to mariner's wages, the legislature shall hereafter find it necessary to alter it;" that is, this trial by jury had been used and practised in all causes at common law, above 40s. value in the *first* instance, and under that value on an appeal, and this article provided that this usage and practice should be continued; and it was strictly continued till March 11, 1784, when this sum or value was raised from 40s. to £4; this was done, after a severe contest, by a vote, carried by the democratic party by a small majority; the minority contending it was a violation of this article in the constitution; for though the jury trial was preserved on the appeal, yet it was not preserved in the ancient way; as in that the party had his jury trial in the *first* instance, in all causes between 40s. and £4, whereas, by this new provision, he could have it but on an appeal, and but after a trial without a jury; the ancient and established land marks being thus removed, this sum or value of £4 was raised to £6, or \$20, without much opposition.

By a law passed 243 of Rome, an appeal lay from any magistrate to the Roman people; but St. Paul appealed to Cæsar.

ART. 2. *In what cases an appeal lies.*

§ 1. It has been expressly decided that the constitution gives no appeal; but every appeal must be claimed in virtue of some statute giving it. We have already seen in the last chapter, that, generally, the party aggrieved may appeal from the decree &c. of a judge of probate, to the Supreme Court of Probate; from the judgment of a justice of the peace to the

1 Mass. R.  
443.

CH. 188.  
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Common Pleas; and from the judgment of the Common Pleas, to the Supreme Judicial Court; so a deft. convicted by a justice of the peace, in a criminal case, from his sentence, to the Sessions; and that certain appeals are allowed in the Federal courts. But few decisions have been made, showing how far appeals, on these various statutes, may be legally claimed or not; these may be stated here, or referred to where already stated; no appeals by the common law; and a. 4, s. 4, no appeal lies from an order of a county or corporation court in Virginia, for binding out an apprentice, or for rescinding his indentures. It seems in such case, a *certiorari* lies from the General Court, to bring up the proceedings, and to correct them. No appeals are allowed but by *statute law*.

Cooper v.  
Hopkins, 1  
Hen. & M.  
412, 422.

1 Cranch,  
212, Clarke  
v. Bazadone.

§ 2. *Federal courts.* Held, in this case, that no appeal or writ of error lies from the courts of the territory northwest of the river Ohio.

4 Cranch,  
370, Morgan  
v. Callender.

§ 3. But that an appeal lay from the District Court of the United States for the territory of Orleans &c. directly to the Supreme Court of the United States. Also, 6 Cranch, 307, 324.

1 Cranch,  
318, U. States  
v. Hoos.

§ 4. Upon appeal in chancery cases, a statement of facts must accompany the transcript of the record. This provision was revived by the repeal of the judiciary act of February 13, 1801.

3 Cranch,  
179, Ray v.  
Low.

§ 5. A decree for the sale of the mortgaged property on a bill to foreclose, is a final decree, from which an appeal lies to a higher court. Act of Congress respects only final judgments.

3 Cranch,  
159, U. States  
v. More.

§ 6. But no appeal or writ of error lies in a criminal case; in the District of Columbia; only in civil causes by the act.

4 Cranch,  
384, Young  
v. Bank of  
Alexandria;  
see Ch. 28, a.  
8, s. 7; Ch.  
187, a. 7, s.  
21.

§ 7. In this case, the Bank of Alexandria was plt. and judgment was in its favor in the Circuit Court of the District of Columbia. Held, that an appeal or writ of error lies from its judgment to the Supreme Court of the United States, notwithstanding the clause in its charter to the contrary. So 8 Cranch, 251, a probate case.

2 Cranch,  
349, Riley v.  
Lamar & al.

§ 8. If an appeal be claimed in the court below, the same term in which the decree is made, a citation is not necessary.

4 Cranch,  
2, Jennings  
v. Carson.

§ 9. *The thing* in proceedings *in rem*, does not follow the cause into the Appellate Court; but remains in the lower court, which may order it sold, if perishable, notwithstanding the appeal. See appeals in these courts, in sundry instances, Ch. 187, provided for by statutes; District of Columbia, only on a final judgment.

3 Wheat.  
600.—1  
Cranch, 137.

It is the essential criterion of appellate jurisdiction, that it revises and corrects the proceedings below, and does not create a cause.

Two citizens of the *same* State, in a court in their State, claim title to lands under the same act of Congress; the Supreme Court of the United States has appellate jurisdiction to revise the judgment of the State Court; one great object is a uniform construction of the laws of the United States. 4 Cranch, 382, *Matthews v. Zane*; 5 Do. 92.

CH. 188.  
Art. 2.

§ 10. *Massachusetts courts.* Appeal does not lie from a justice of the peace to the Common Pleas in a *militia* case; see *Mountfort v. Hall*, in error, Ch. 137, a. 4; nor in process of *forcible entry*; see *Forcible Entry*; nor in prosecution for the maintenance of a *bastard child*, for either party; nor in *audita querela*, act 1781.

Mass. Act,  
Mar. 15, 1796.

§ 11. Where not from a judgment of the Common Pleas, on a report of referees, agreed to be final.

Mass. act,  
March 3,  
1792.

Where an appeal lies from the Common Pleas in the cases of \$50 and \$100 value. See *Massachusetts act*, March 9, 1804, June 21, 1811, cited Ch. 187.

§ 12. No appeal lies on default before a justice of the peace, or in the Common Pleas. *Mass. act*, March 9, 1804; and March 11, 1784.

But where it lies, judgment in the Common Pleas being arrested. See *Bemis v. Faxton*, Ch. 146, a. 7.

Where an uncle cannot appeal from the probate court, in the case of a *non compos &c.* *Penniman v. French*, Ch. 35, a. 10.

§ 13. Appeal lies only from a *final* judgment of the Common Pleas, except in three cases, specially provided for, viz.: Abatement, Account, and Partition; as where an action was entered on the 27th day of the term, by leave of the court, a deft's. bail moved for himself and principal, it be dismissed, and the plt. nonsuited, as the deft., during the term, had left the State; Common Pleas refused the motion; from this refusal, as a judgment, A, for the deft., claimed an appeal; this was disallowed by that court; moved the Supreme Judicial Court to sustain the appeal. Held, it could not be sustained, for the appeal allowed by the statute is from a *final* judgment; but if the court below arrest the judgment, or send the parties out of court without giving any judgment; from such determination of the cause by the court, where an appeal lies, the party aggrieved may claim an appeal; and if not allowed, this court will sustain it; "otherwise there would be a total failure of justice." It seems it might have put the *gravamen* on record, left the cause to proceed to a *final* judgment, and then appealed from it.

4 Mass. R.  
107, *Lamphear v. Lamprey*.

§ 14. No appeal lies from the Common Pleas to the Supreme Judicial Court, in a *criminal* proceeding, brought into that court by appeal from a justice of the peace. This was

Commonwealth v. Messenger.

CH. 188.  
Art. 2.

a prosecution for a breach of the Lord's day, originally before a justice. Held, also, the fact must be strictly charged, but a rigid adherence to form will not be required; and in this case it is sufficient to allege the fact on the Lord's day generally, and conclude against the statutes enacted for the due observation of the Lord's day."

§ 15. Where there is an appeal, error does not lie; Ch. 137, a. 4, *Savage v. Gulliver*, *Jarvis v. Blanchard*, &c.; but if the deft. agree not to appeal, he may have error; Ch. 137, a. 4, *Putnam v. Churchill*; also *Champion v. Brooks*, Ch. 137, a. 4; and where an appeal lies, the judge below is not bound to allow a bill of exceptions.

6 Mass. R.  
398; and Ch.  
71, a. 5.  
2 Mass. R.  
150, *Dean v.*  
*Dean*.

No appeal lies to the Supreme Judicial Court by act of July, 3, 1782, c. 11, except in *civil* suits commenced by writ; there is no appeal from a probate court, on the act of June 18, 1791, by reason of the discretionary power given to sustain appeals in civil actions, as that act does not relate to the probate courts. It seems, therefore, a probate suit or proceeding is not a civil action.

Mass. R.  
Feb 14,  
1787—*Maine*  
act, Ch. 37,  
s. 6.

§ 16. In petition for partition, the deft. may appeal from the first judgment, *that partition be made*; but if he do not, but appeals after *final* judgment, the first judgment is not appealed from, nor can it be affected by any appeal made after final judgment; and if the appellant fail to prosecute his appeal, and enter it, judgment is affirmed on complaint; the same in a writ of partition.

For appeals in actions of account. See Account.

8 Mass. R.  
98, *Stone v.*  
*Kelley*; and  
10 Mass. R.  
179.

17. This was *assumpsit* on a simple contract, *ad damnum*, above \$50; at the Common Pleas, plt. had judgment for \$39; deft. appealed; entered his appeal, and then was defaulted. Held, the appeal lay, for the plt.'s demand was above \$50, (though here covered less) plt. entitled to double costs. Stat. 1803, c. 155, s. 5; or Mass. act, March 9, 1804.

11 Mass. R.  
271.

§ 18. *Writ de homine replegiando*. Held, in this case, an appeal lay to the Supreme Judicial Court, from judgments of the Circuit Courts of Common Pleas; on Statutes, 1782, c. 9, c. 11.

11 Mass. R.  
394, *Wellington v. Strat-*  
*ton*, jun.

§ 19. So an appeal lies from the said Common Pleas to the Supreme Judicial Court; and in such appeal, this court, on a judgment below on a state of facts, agreed by the parties, for the opinion of that court, will not inquire into the merits of the judgment, unless there is something in the record to show it was erroneous; the principle is, "that when the parties have agreed that a judgment shall be rendered for either of them according to the opinion of the judges on a case stated, the court of errors cannot rescind that agreement, and enter a different judgment."

§ 20. An appeal lies to the Court of Errors from an order of the Court of Chancery, refusing to dissolve an injunction, and awarding costs against the defts. Chancery aids a deft. in obtaining a discovery before trial at law, but not afterwards. 4 Johns. R. 510, M'Vickar & al. v. Wolcott. CH. 188. Art. 3.

§ 21. On an appeal to the Court of Errors, it will decide on those parts only of the decree of the court below, complained of in the petition of appeal. 4 Johns. R. 636, 606.

ART. 3. *Form of proceeding &c.* Month in the probate appeal, is a calendar month. Avery v. Pixley, Ch. 27, a. 4 and a. 2.

§ 1. An appeal from the judgment of a justice of the peace, or of the Common Pleas, must be in the court or term in which judgment is given; see said Statutes, Ch. 187.

§ 2. There is no appeal, but where an issue is joined by the parties. Mass. act, March 11, 1784. Mass. act, Mar. 9, 1804.

§ 3. To entitle the party to an appeal either from the Common Pleas, or a justice's judgment, he must recognize to the adverse party with sufficient surety or sureties, to prosecute his appeal *with effect*, and to pay all intervening damages and costs; and if either court refuse the appeal, the appellant may offer sufficient sureties and recognizance, and fees for taking it; and then enter his appeal in the proper court, and if it have appellate jurisdiction, it will sustain the appeal, and the appellant must produce, at the court appealed to, attested copies of the case, or a complete transcript of it. Mass. act, July 3, 1782; Mass. act, Mar. 11, 1784. 1 Mass. R. 443. Mass. act, Mar. 11, 1783.

§ 4. On an appeal in the case of a will or codicil, and from the reasons of appeal filed, it appears "that the sanity of the testator, or the attestation of the witnesses in his presence," is a question, the Supreme Court of Probate may, for the determination thereof, direct a real or feigned issue, to be tried before a jury in the same court. By Massachusetts act of January 29, 1819, section 2, one justice may try an issue to the jury, on appeal, subject to exceptions. Mass. act, Mar. 11, 1784, Ch. 187.

§ 5. An appeal from a decree &c. of the Probate Court must be made to the next term of the Supreme Court, though one judge is by law authorised to hold the court. This, said the court, had been the practice, and three justices might have been present at this term; pleadings as to the testator's sanity. 6 Mass. R. 397, Hubbard v. Hubbard.

How a return of the division of an estate is open to objections on the probate appeal. See Sever v. Sever, Ch. 149, a. 2.

§ 6. Petition to enter an appeal from the Common Pleas, at a subsequent term, not entered at the proper term by accident or mistake. Held, this mistake or accident must be specified in the petition. 1 Mass. R. 230, Jackson v. Goddard.

CH. 188. Where a probate decree may be reversed in part, and affirmed in part, on an appeal. *Dexter & al. v. Brown.*

Art. 3.

As to the endorser of a writ being liable to costs on an appeal. Ch. 175, a. 9, *Fairbanks jun. v. Townsend.*

Where the executor &c. of the residuary legatee, must make the probate appeal. *Downing v. Porter*, Ch. 149, a. 2.

§ 7. As to appeals not seasonably entered in the Supreme Judicial Court. See Ch. 189, a. 2, Massachusetts act, June 18, 1791.

Coit v. Geer.

§ 8. As to appeals in Connecticut; see Kirby's R. 17: an appeal lies after a default and a hearing in damages; other cases, 35, 89, 247. In *qui tam* for theft, it does not lie, 269; but if the plt. in such case, sues only for damages, he may have an appeal; cases 278, 280, 364; none to an adjourned court; other cases, 387, 2 Day's Ca. 12; 4 Do. 237.

ART. 4. *The effect of an appeal.*

§ 1. How, if legally made, it makes the judgment appealed from of no effect; and how the appeal is a nullity where none is given by law. *Campbell v. Howard*, Ch. 140, a. 1.

For the effect of a probate appeal to suspend proceedings on the decree &c. below. See Massachusetts act, March 12, 1784, cited Ch. 187, a. 15.

3 Dallas, 187,  
106, in  
Doane's case.

§ 2. The appeal itself suspends the decree of the Inferior Court; but a writ of *inhibition* is proper and necessary to enable the court appealed to, to punish the Inferior Court for *contempt*, in case of disobedience, which the appeal does not, as that is only the act of the *party*, and not of the Superior Court.

3 Dallas, 88,  
102, in  
Doane's  
case.

§ 3. Whatever could be brought forward by way of defence in a court of appeals, must, *in it*, be brought forward, or the party can never take advantage of it after.

14 Mass. R.  
412; see Ch.  
187, a. 7, s.  
42, this case  
stated.

§ 4. *No appeals from a State to a Federal court*; as where, by act of Congress, of March 3, 1815, it was provided, that in any action in a State court, brought for any thing done or omitted by an *officer of the customs*, either party, after final judgment, might *appeal* to the Circuit Court of the United States; and the 7th article of amendments of the constitution of the United States provides, that in suits at common law (of \$20 value) the right of trials by jury shall be preserved; "and no fact tried by a jury shall be otherwise re-examined, in any court of the United States, than according to the rules of the common law;" hence, in the Federal courts, no fact tried by jury in a common law case, can be re-examined, but in the form of a new trial; 6 Cranch, 307, 324; where the appellate power of the Superior Court of the United States may be exercised by a writ of error; also 6 Cranch, 286,

308; to correct the judgment of a District or of a State Court. CH. 188.  
Art. 5.

§ 5. But very few appeals appear in the States south of New England. No appeal lies to the Supreme Court in New York from the *Surrogate's* order for appointing measurers of dower, under the act (Sess. 29, c. 168); the 10th section gives an appeal only *after* the filing the report of the admeasurers; and then the question of seizin, or any other question which may arise, may be tried by a jury on a feigned issue, or in some other mode which this court may prescribe. 10 Johns. R.  
368.—9  
Johns. R.  
24

§ 6. On a petition of appeal, the appellant omitted to state the *reasons* in the appeal, and the respondent answered the petition. Held, he was too late to object afterwards to any defect, in form, in the petition. 3 Johns. R.  
564, Rogers  
v. Cruger.

ART. 5. *Appeals to the court for the correction of errors in New York.*

§ 1. By the constitution of the State, a court is instituted Art. 32.  
“for the trial of impeachments and the correction of errors,” consisting of “the president of the senate, for the time being, and the senators, chancellor, and judges of the Supreme Court, or the major part of them; except that when an impeachment shall be prosecuted against the chancellor, or either of the judges of the Supreme Court, the person so impeached shall be suspended from exercising his office, until his acquittal; and in like manner when an appeal from a decree in equity shall be heard, the chancellor shall inform the court of the reasons of his decree; but shall not have a voice in the final sentence; and if the cause, to be determined, shall be brought up by writ of error, on a question of law, on a judgment in the Supreme Court, the judges of that court shall assign the reasons of their judgment, but shall have no voice for its affirmance or reversal.” This court proceeds “under the regulations which shall be established by the legislature.” It is from the decree in equity the appeal lies to this court of errors, as in the following cases &c. See art. 2, s. 20, *Mc Vickar & al. v. Wolcott*; a. 6, *Rogers v. Cruger*.

§ 2. Held, by the court above, that on an appeal from an order of the court of chancery, postponing the hearing of a cause until the assignees of two of the parties, who had become insolvent pending the suit, should be made parties, it would not hear or decide on the merits of the case: 2. On an appeal from an interlocutory order in chancery, this court of error would not allow evidence to be read, not read in the court below: nor, 3. Will said court above hear and decide on the merits, unless the merits have been heard in the Court of Chancery: 4. Where a party in a cause in that court, becomes insolvent pending the suit, his assignees must be made parties 3 Johns. R.  
Dees v.  
Thorne & al.  
543, 552.

CH. 188. before the cause can be heard. This was a suit on policies of insurance assigned, brought into chancery on charges of fraud.  
 Art. 5.

3 Johns. R.  
 566 to 608,  
 Huntington,  
 trustees v.  
 Nicoll.

§ 3. The general guardians of Nicoll, a minor seven years old, filed their bill in chancery against the appellants, the trustees of the freeholders and commonalty of the town of Huntington, Isaiah Jarvis and eight others; and the chancellor awarded, by a temporary order, an injunction. Held, that no appeal lay from this order, and it having expired, the appeal was dismissed. Held, 2. On an appeal from an order granting an injunction to stay proceedings at law, the court of errors will not hear and decide on the merits of the cause, if the court below had not heard the cause on the merits before the order: 3. If a bill be filed in the Court of Chancery to prevent many lawsuits, to have all tried in one suit, under the chancellor's direction, it seems the bill will be sustained, if there has been but one or two trials at law: 4. No appeal lies from an order in chancery, for the examination of the guardians of the complainant, a minor, as witnesses for him, such examination being always taken *de bene esse*, and saving all just exceptions; and if inadmissible on account of the incompetency of the witnesses, may be suppressed at the hearing before the chancellor, or if admitted, may then become the ground of appeal.

1 Johns. R.  
 529 to 579,  
 Behee & al.  
 v. Bank of N.  
 York, in error.—2  
 Johns. Ca.  
 413.

§ 4. This cause came before the Court of Errors on an appeal from an interlocutory order of the Court of Chancery; and the Court of Errors gave judgment on the merits of the case, and reversed the judgment below, and ordered the appellants receive the monies in dispute, the net proceeds of the sales of a certain estate sold on a *fieri facias*; and that the proceedings be remitted to the Court of Chancery.

9 Johns. R.  
 443, 449,  
 Buel & al. v.  
 Street & al.—  
 4 Johns. R.  
 529.

§ 5. Held, 1. No appeal lies to the Court of Errors, from an order of the Court of Chancery, for an attachment to bring up a party to answer interrogatories, for a contempt in disobeying a writ of injunction, issued in a cause: 2. It seems an appeal does not lie from any interlocutory order, which does not involve in it a decision on some matter touching the merits of the cause, and by which the party is aggrieved.

See important distinctions between error and appeal, Ch. 224, especially art. 8, s, 17, case of the San Pedro.

Conn & al. r.  
 Penn, 5  
 Wheat. 424.

§ 6. In appeals in chancery cases, from Circuit Courts, the parol evidence heard in the trial in them, ought to appear on the record: 2. No final or important interlocutory decree ought to be made, until all parties interested are before the court.

6 Wheaton,  
 129, Ran-  
 dolph & al. v. Barbour & al.—1 Hen. & M. 403, 409.

§ 7. Held, where an appeal has been taken in an equity

suit, from the Circuit Court to the Supreme Court, but not prosecuted, it will be dismissed on a certificate from that court that the appeal has been taken and not prosecuted. See rule 32, 6 Wheaton, p. 1, Preface; 6 Wheaton, 452, a similar case. An appeal or *supersedeas* to a judgment, is not to be granted to any person not interested in the matter in dispute. Sayre adm. v. Grymes.

CH. 188.  
Art. 6.

ART. 6. *Appeals in Virginia.*

§ 1. Though in this, as in the other States, appeals are unknown to the common law; yet in Virginia appeals are uncommonly numerous, owing, I conceive, to several causes. 1. There are in this State above one hundred county and city courts, held monthly by the justices in the counties, and the usual officers in cities. They are truly inferior courts, in her system of jurisprudence, and even police; yet in them almost all causes are commenced in law and equity, criminal and civil, real, personal, and mixed, probate and pauper, besides all those causes of law and police usually adjudged or regulated by the Courts of Sessions in England, and formerly in Massachusetts. Above the courts of counties, cities, and boroughs, are a middle grade of courts, both of law and equity; as three Superior Courts of Chancery, held in the three districts into which the State is divided; and a number of District Courts of law, held in the law districts, into which the State is also divided. January 1, 1809, in the place of these District Courts, a Superior Court of law, held by one judge, in each county, was established, with the powers of the District Courts. 4 Hen. & M. 173. Above all, is a third grade, that is, the Supreme Court of Appeals, (sits one hundred and twenty-six judicial days in a year, by law, if the business be not sooner done,) which has a final jurisdiction by appeal, writ of error, *supersedeas*, or otherwise, of near all kinds of causes. The county courts having common and chancery sides, probate and other sorts of jurisdiction, the real sources of appeals are many: 2. Numerous statutes; for instance, in the year 1794, a statute provided, that "where any person, or persons, body politic or corporate, shall think themselves aggrieved by the judgment or sentence of any county court or court of hustings, in any action, suit, or contest whatsoever, where the debt, or damages, or other thing recovered or claimed in such suit, exclusive of costs, shall be of the value of \$100, or 3000 lbs. of tobacco, or upwards; or where the title or bounds of lands shall be drawn in question; or the contest shall be concerning mills, roads, or probate of wills, or certificates for obtaining administration, such person &c. may enter an appeal to the next District Court;" and appeals from the chancery side of these numerous county, city, and borough courts,

Rev. Code,  
c. 66.

CH. 188.  
Art. 6.

Rev. L. p. 6.

are claimed on chancery principles. By this act of 1794, we see one appeal allowed of course in almost every cause of any considerable importance ; and in all causes, to whatever small amount, touching the titles or bounds of lands, mills, roads, or probate cases. By another statute enacted in the same year, 1794, it was provided, that “ appeals, writs of error, and *supersedeas*, may be granted, heard, and determined by the court of appeals, to and from any final decree, or judgment of the High Court of Chancery, General Court, and District Courts, in the same manner, and on the same principles, as appeals, writs of error, and *supersedeas*, are to be granted, heard, and determined by the High Court of Chancery and District Courts, to and from any final judgment or decree of a county, city, or borough court. Thus a second appeal is allowed in almost every cause ; and by appeal, writ of error, or *supersedeas*, nearly all causes, if not all, may thus go up by steps to the last resort, the Supreme Court of Appeals, of late years reduced to three judges. And if we are to judge from Virginia reports, near three-fourths of their business is to hear and decide chancery causes ; so very uncertain has this portion of jurisprudence become. While, it is well known chancery grounds, well understood, do not embrace a seventh part of the whole grounds of jurisprudence in a well governed state or nation. Chancery causes seems to be numerous in Virginia, in which appeals are of course.

§ 2. There are a few restraints on appeals in this State. There is none as to binding out apprentices and rescinding their indentures. See, *The Poor*, Ch. 53, a. 1, s. 29. Though in such cases, error or *supersedeas* lies to a District Court ; as also a writ of *certiorari* at common law generally. An act, passed in October, 1777, provided, that the jurisdiction of the General Court “ shall be general over all persons, and in all causes, matters, and things at common law, whether brought before them by original process, by appeal from any inferior courts, *habeas corpus*, *certiorari*, writ of error, *supersedeas*, *mandamus*, or by any other legal ways or means ;” and by an act of 1792, similar powers were generally given to the District Courts in their respective districts. In both cases there are exceptions in regard to commencing actions in them for less value than £10, (\$33½) except in some cases named.

§ 3. The sum recovered is the rule, not that declared for ; therefore, when the plt. declared for £50, and recovered less than £30, held, there was no appeal ; *Bedengen v. Commonwealth*, and various other like cases. Bill of review lies only after final judgment ; *Mitford’s Pleadings*, 78 to 84 ; and if, *pendente lite*, it be moved for, and the Superior Court of Chancery deny it, no appeal lies. See *Mc Call v. Peachy*, 1 Call, 55 ; Ch. 226, a. 8, s. 5.

Hepburn v.  
Lewis, 2 Call,  
498.—3 Call,  
451.—Bowyer  
& al. v. Lewis,  
1 Hen. &  
M. 553.

§ 4. An appeal abated at one term by the appellant's death, his administrator qualified, and on his motion, the next term, a *scire facias* was awarded to the appellee to show cause why the appeal should not be revived. *Buster v. Wallace*, 3 Hen. & M. 217.

§ 5. The judges of the several Superior Courts of Chancery, cannot grant appeals from interlocutory decrees in vacation; but in court only. President, and professors, and masters of William and Mary college *v. Hodgson & al. executors of Lee*. A decree to foreclose a mortgage and directing a sale of the mortgaged premises, is an interlocutory decree: was before sale, and commissioner's report returned. Judge Fleming observed, "by our laws, any party thinking him or herself aggrieved by a final judgment or decree of any inferior court, may, as a matter of right, appeal to a court of superior jurisdiction, on complying with certain" terms, except in cases of forthcoming bonds.

§ 6. If a Superior Court of Chancery order an injunction reinstated and a new trial at law, this is an interlocutory decree, from which an appeal cannot be allowed. *Price v. Strange*, 2 Hen. & M. 615. The power of a judge of the Supreme Court as to appeals; 3 Hen. & M. 199, 217, *Tomlinson v. Dilliard*; *Mackey v. Bell*.

CH. 189.  
Art. 1.

Gibbs *v.*  
Perkinson, 2  
Hen. & M.  
211.

2 Hen. & M.  
557, *Fairfax*  
*v. Muse's*  
ex'rs.—1  
Rev. Code,  
c. 63, 64, 167.  
—Knox *v.*  
Garland, 2  
Call, 241.—3  
Hen & M.  
259.

## CHAPTER CLXXXIX.

### REVIEWS.

#### ART. 1. *General Principles.*

§ 1. A review is a second trial of the same action in the same court, and by another jury. The review in civil actions depends entirely on Massachusetts statutes: is in fact a new trial on the old issue, after judgment. It is confined to civil actions, and to cases in which there has been a verdict; and no party can review after there have been two verdicts against him.

See Reviews  
in Equity,  
Ch. 226, a.11.

§ 2. The whole cause is tried on the review, in the same manner it would be if no judgment had been given in it; and the former judgment may be reversed in whole or in part; and greater, or less, or no damages, may be assessed on the review, according as the law and the evidence may be in the case;

CH. 189. and a review does not lie, but where the action is commenced  
 Art. 2. by writ. Then to entitle a party to this novel mode of proceeding, of right, the action, 1st, must have been commenced by writ, not by petition, or complaint : 2. Must be a civil action : 3. There must have been one verdict against him : and 4. It must be an original action, not *audita querela*, or *scire facias*, &c. These principles, being well settled, limit the cases of reviews very much.

ART. 2. *Massachusetts statutes.*

C. & P. Laws, § 1. In early times, in the Colony appeals, were sometimes  
 93. called reviews. Before 1672, reviews were allowed ; but it does not appear to have been settled, that they should be had in the same court in which the action was at first commenced. Therefore the legislature in that year resolved reviews should be so had. But upon an action of review the costs of former courts were not allowed. But no particular form of proceeding in this action was pointed out by the Colony legislature.

C. & P. Laws, § 2. In 1692, provision was made, that a party cast in the  
 219. Common Pleas, might appeal, "or by a new process, once and no more, review his case in the same court where it was first tried ;" and in ten days after judgment in review, the aggrieved party might bring a writ of error, "for the trial of the said case at the next Superior Court" in the county. Security to prosecute &c. was as before stated.

C. & P. Laws, § 3. In 1701, reviews were allowed in the Superior Court,  
 368, 589. and in the Common Pleas, once in any action, evidently in the place of a new trial, within three years, on the usual terms. But the execution was not stayed by the review, till A. D. 1751, when a bond was required &c.

C. & P. Laws, § 4. An act passed 1720, explanatory of the above act,  
 430. and directed when both parties reviewed in the Superior Court, "both writs or actions of review" should be committed together to the same jury.

C. & P. Laws, § 5. An act passed 1733, directing writs of review to be  
 490. served on attornies, ter tenants, agents, factors, and trustees, in certain cases.

C. & P. Laws, § 6. An act was passed 1751, declaring the act of 1701  
 574. not to extend to judgments on informations filed by impost officers.

C. & P. Laws, § 7. An act was passed in 1757, denying the writ of re-  
 611. view in the Inferior Court of Common Pleas ; and after two verdicts in favour of the same party in any action.

Mass. act, § 8. By this act it is enacted, "that either party aggrieved  
 Feb. 26, 1787, at the judgment of the Supreme Judicial Court, where only  
 as to reviews of right, one verdict hath been given against him in such action," may,  
 repealed, Feb. 9, 1818, in two years, review the same, and have one trial more ; "and  
 as to future appeals, see post, 23, Maine act, ch. 57.

there shall be no further pleadings, but the action shall be tried upon the review by the same issue," originally joined by the parties. Execution is stayed only on bond given as directed by the act; and the party reviewing must produce "attested copies of the writ, judgment, and all papers used and filed in the former trial, and each party shall have the liberty to offer any further evidence." By the proviso, disabled persons may review in two years after the disability removed.

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§ 9. Section 2 provides, the whole cause be tried "in the same manner as if no judgment had been given thereon; and the former judgment may be reversed in whole, or in part, or greater damages or less, or no damages, may be given;" as if both parties review.

§ 10. Section 3 provides, "when joint damages are recovered against more than one original deft. and not all review, he or they reviewing must purchase the writ of review in the name of all the original defts.; and if any of them neglect to appear, their non-appearance is recorded, and he or those who appear, may prosecute to final judgment, and if he or they reverse the former judgment in whole, entitled to costs, and a restoration of the damages" paid on the former judgment; but "if in part, only entitled to costs and restoration of the part so paid, as far as this part exceed the judgment in review."

§ 11. Section 4 provides, "when several damages are given against several defts." either of them may review, as if no other original deft. in the cause; and if he obtain a reversal in whole as to him, is "entitled to a restoration of all damages and costs by him paid:" if in part only, is entitled to costs and to a restoration of so much of the damages so paid, as the sum so paid exceeds the damages given in review.

§ 12. Section 5 provides, that the original deft., or defts., his agent or attorney, may stay execution for damages or goods by giving bond, as appears in the form below, when judgment is given with surety or sureties approved by the court. The writ of review, in the absence of the deft., may be served on his agent, attorney, or trustee, and the cause may be continued for one or more terms.

Section 6 provides, the part of the defts. reviewing may be admitted to give the bond for the whole sum, and stay execution as against all

Section 7 provides, in real actions, "where the deft. or defts. in review, live out of the Commonwealth," the service of the writ on the tenant or person in possession, is good.

13. This act recites, the justices of the Supreme Judicial Court have power, "in certain cases to set aside verdicts and grant new trials;" but no power to set aside judgments rendered on verdicts, whence inconveniences may arise &c.

Mass. act,  
June 18,  
1788, re-  
views on pe-  
tition.

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Maine act,  
ch. 57.

§ 14. Section 1 enacts, that when any "legal cause" for the court exists, before judgment, to grant a new trial, but judgment is given on the verdict, the party aggrieved by it, and not legally entitled to a review, may petition said justices "at any of their terms for a review of such cause;" and they, "on due notice to the adverse party," are empowered to grant it, if they see fit, on such conditions as they think reasonable."

§ 15. Section 2 provides for cases of mistake and accident, or some unforeseen cause; and enacts, "that wherever, by reason of accident, mistake, or any unforeseen cause, judgment hath been, or hereafter may be, rendered on discontinuance, nonsuit, *nil dicit*, *non sum informatus*, report of referees, or default; or suits have been, or hereafter may be, discontinued without judgment," the said justices, on petition, may grant a review of the action, as in the first section.

§ 16. Section 3 provides for like cases (as in said second section) in the Common Pleas, and in the courts of justices of the peace; or if any appeal be lost to the hindrance of justice, and the party aggrieved file in the clerk's office of the Supreme Judicial Court, a "copy of the record of the cause, duly attested," and petition it for a review of the cause, this court may grant it, if it see fit, on reasonable terms, "to be heard and determined in the said Supreme Judicial Court;" but no petition can be sustained after eighteen months from rendering the judgment, and but one review in any case.

§ 17. Section 4 provides a writ of review, on this act, be sued out, and prosecuted to final judgment and execution, as in other cases.

Section 5 provides, the justices of the Supreme Judicial Court may stay execution in the cause on such terms as they deem reasonable; and also give costs to the respondent against the petitioner, and execution, where he is adjudged to take nothing by his petition.

Mass. act,  
Feb. 9, 1789,  
Maine act,  
ch. 57.

§ 18. This act provides for prosecuting writs of review, after the death of any, or all of the parties in any real or personal action, in which a review is allowed by law. The general principle of this act, is section 1, as to real actions, if the demandant or deft. die before the time of review is out, the tenant in possession, or the person entitled to hold the same under the deceased party &c. is put in his place.

§ 19. Section 2 relates to personal actions, and provides where one or both parties die before the time of review is out, the executors or administrators of the deceased may sue out a review, defend in it, &c. Proceedings as in other cases *mutatis mutandis*.

§ 20. Section 3 provides, that if either party die pending

the writ of review, his heirs or any person interested in the tenements, or his executors or administrators (the death being noted on the record) may come in and prosecute or defend to final judgment; and if such do not appear, or, appearing, are nonsuited, or defaulted, such proceedings may be had, *mutatis mutandis*, as might have been between the original parties.

§ 21. This act, section 2, empowers the Supreme Judicial Court, at discretion, to allow appeals to be entered in it, in civil actions or complaints, when not entered in season, "by reason of any accident, mistake, or unforeseen cause, to be on petition &c. at any other term in the county, and to proceed as if regularly entered; but every such petition is limited to one year after such appeal should have been entered; but no attachment or bail is affected by this act; but the same remains discharged." Section 3, extends the like powers to the Common Pleas, as to justice causes.

Section 2, makes a general unlimited provision as to reviews; and provides, "that the said justices (of the Supreme Judicial Court) be and they are hereby vested with a discretionary power to grant reviews in civil actions, whenever they shall judge it to be reasonable, without being limited to particular cases, any omissions in the aforesaid act notwithstanding." (Act June 18, 1788.)

§ 22. This act provides for the service of the writ of review (among many other cases.) See Service.

As to reviews of suits on probate bonds; see Probate.

§ 23. When an action is brought in the Common Pleas against an absent debtor, on these acts, and reviewed within the year, it is reviewed in the same court, and concludes thus: "Wherefore, for reversing the said last mentioned judgment and recovery back from the said C &c. the said sum of \$—, damages and costs aforesaid, he the said B, by virtue of an act entitled an act providing that suits where goods, or other estate is attached, the deft. be summoned," brings this suit, and have you there this writ &c.

This act repealed the act of February 26, 1787, yet it ought to be kept in view, as many cases have been decided on it, and many titles rest upon them.

By Massachusetts act of January 29, 1818. In this, action in the Supreme Judicial Court, it has power to amend the original writ, record, or proceedings in any part thereof, on reasonable terms.

ART. 3. *Cases decided on the statutes as to reviews.*

§ 1. This was a petition for a review entered &c. stating certain grounds for the review; and the court held, that the petitioner must be holden to the allegations in his petition;

CH. 189. and this seems reasonable, for the deft. comes prepared to  
 Art. 3. answer this only.

1 Mass. R.  
 129, Clap,  
 plt. in R. v.  
 Josleyn.

§ 2. In this action there was a verdict and judgment for the deft. in the Common Pleas, and again in this Supreme Judicial Court. So two verdicts against the plt. ; he petitioned on the act of June 18, 1788, for a review, but no notice was given to the deft. of this petition, as that act required. Review was granted. The deft. made affidavit that he had no notice of the said petition. Held, he was entitled to notice ; but as the parties appeared, the court was of opinion it might hear them upon the merits.

§ 3. Where an administrator of a party deceased, in a writ of review in trespass, may come in and prosecute. See *Monumoi Proprietors v. Rogers*, Ch. 91, a. 8 ; Ch. 92, a. 2 ; Ch. 82, a. 5.

§ 4. No new trial where the party may review. *Cogswell v. Brown*, Ch. 183, a. 6.

1 Mass. R.  
 242.

Pleadings in review cannot be altered without consent. So are the express provisions of the act of February 26, 1787.

§ 5. Where costs are not allowed to the petitioner for a review granted. *Ilseley v. Knight*. This review was occasioned by the petitioner's own miscalculation of interest.

4 Mass. R.  
 103, Hicks v.  
 Atkinson.

§ 6. A recovered \$100 against B, he reviewed, and gave a bond to prosecute his review to final judgment, and to pay the damages and costs, to be recovered in review of the former judgment and interest. He entered his review, and then was nonsuited. In debt on this bond A recovered the amount of the first judgment and interest on it ; but *quare* as to the costs of the nonsuit in review.

4 Mass. R.  
 349, Rogers,  
 ptr. v. Hill.

§ 7. Held, the court will not receive the affidavit of a petitioner for a review, but in two cases : 1. Only in cases in which the facts are exclusively in his own knowledge : or 2. Merely for obtaining an order of notice.

4 Mass. R.  
 375, Wood-  
 ward's case.

§ 8. This was a petition for a review. By the death of the petitioner it abated ; and his executor could not be admitted to prosecute the petition pending when Woodward died. Not within the provisions of any of the said acts.

4 Mass. R.  
 520, Dick-  
 erson v. Davis.

§ 9. Dickerson petitioned for a review against Davis. Held, a review lies not on a judgment of the Common Pleas, on a report of referees on the referee act of 1786, c. 21.

5 Mass. R.  
 260, Hart's  
 case.

§ 10. Hart petitioned for a review. Held, that if the court perceive, on a view of the papers, that the judgment complained of must be severed on error, it will not grant a review.

5 Mass. R.  
 363, Byrnes  
 v. Piper.

§ 11. Byrnes petitioned for a review against Piper &c., stated he had no notice of the suit, and was out of the State ; not granted, for he may sue his writ of review on the statute

respecting absent defts; but no costs to the respondent, as the petition does not appear to be vexatious, and the facts not denied.

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§ 12 Massachusetts Supreme Judicial Court, Lincoln county, 1796, June term. The plt. sued for 400 acres of land. The deft. disclaimed 300 acres on leave to amend; the plt. filed a new count for a 100 acres, then, on terms, the deft. was defaulted, and by mistake the plt. had execution on the wrong count for the 400 acres, and possession given. On petition on Massachusetts said acts of June 18, 1788, and June 18, 1791, the deft. was allowed to review, though he might have brought error, and though the plt. offered to release the 300 acres; for after the release the deft. would hold under the plt's. title, whereas he ought to hold under his own former title.

Livermore v. How.

§ 13. Pattee & al. sued Emerson and three others, and had a verdict \$1 damages. Emerson alone reviewed, but in the name of all four, and in review Pattee & al. had a verdict for \$17. After this, the three defts. who did not prosecute, were called, and did not appear. Judgment for the \$17 against Emerson alone, and costs on the review, and former judgment affirmed, to stand as a joint judgment against all the original defts. Entered thus, "and now all and singular the premises being seen, and by the court fully understood, it is considered by the court that the said David Pattee, and Mary his wife, recover against the said Asa Emerson the sum of \$17 damages, with their costs, incurred by them in this action of review, taxed at ———, and that the former judgment" &c.

1 Mass. R.  
492, Emerson & al. v. Pattee & al

§ 14. Costs in the original trial not affected on reversal in part. See *Billerica v. Carlisle*. Original deft. reviewed.

2 Mass. R.  
158.

§ 15. The court will require affidavits, as to the facts stated in a petition for a review, before making a rule to shew cause; for the legal costs allowed the respondent are inadequate for being compelled to appear and answer to a complaint that may be idle and vexatious.

3 Mass. R.  
24, Willard v. Ward.

§ 16. *Costs*. The plts. in the Common Pleas recovered less than £4 damages, and full costs, (commenced there;) he reviewed, and recovered one cent damages. The difference the deft. recovered as damages, that is, £4, wanting one cent, with full costs of review.

3 Mass. R.  
234, Lincoln v. Goulding.

§ 17. *Trespass; assault and battery*. Two defts. pleaded severally not guilty. Verdict against both, and joint damages \$10. Plt. reviewed; verdict against Pitman, and \$16 damages, and costs of review. The other deft. was acquitted, and recovered his costs. Whether costs of both actions, or of the review only, *quare*.

3 Mass. R.  
408, Gallo-way v. Pitman & al.

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4 Mass. R.  
579, Judd v.  
Buchanan.

§ 18. Judd petitioned for a review, and stated only he intended to make a defence in the former action, but was defaulted by accident; but did not deny he owed the amount of the judgment recovered. Respondent did not appear. Review granted the respondent to have leave to amend his defective declaration, and the costs of the review to be at the discretion of the court.

4 Mass. R.  
614, Bruce v.  
Learned.

§ 19. In review, the party in whose favour the error is corrected is the prevailing party, and is entitled to his costs in the review. Plt. in review reduced the damages in part. Mass. act, 1784, c. 28, s. 9.

13 Mass. R.  
302, 490.

The court can grant a review on petition of an action in which a judgment has been rendered on a case stated by the parties; but after such review there can be none in the action of right. For several points in review, see *Perry v. Goodwin*, Ch. 130, a. 4.

6 Mass. R.  
513, Ruggles  
v. Freeland.

§ 20. Held, after the court has granted one review on said acts June 18, 1788, c. 11, and 1791, c. 17, it has no authority to grant a second.

§ 21. Where an endorser of an original writ is a witness in the review. See *Ely v. Forward*, Ch. 175, a. 9.

7 Mass. R.  
93, Borden v.  
Bowen.

§ 22. This was a petition for a review of an action or suit on petition for partition. *Curia*. "Reviews are provided only where the original action is commenced by writ."

7 Mass. R.  
252, Coffin v.  
Abbot.

§ 23. When a man petitions for a review, his affidavit may be used on the hearing of the petition, to prove facts known only to himself. The depositions of others must be taken in due form. Slight evidence is sufficient to support a petition for a review, where the petitioner has had no trial.

7 Mass. R.  
280, Vose v.  
Dean & al.

§ 24. Vose was plt. in review against Dean and another, and held, a justice of the peace has no authority to take a recognisance from one charged as the receiver of stolen goods, to the party from whom stolen, to secure to him payment of the treble damages.

7 Mass. R.  
472, Hart v.  
Johnson.

§ 25. The point decided in this case was, that the limitation and settlement act, [statute 1807, c. 7,] does not extend to actions tried on review. The first trial was before the act was passed.

7 Mass. R.  
603, Treat v.  
Hathaway.

§ 26. Where the plt. in review becomes nonsuit because no review lay in the case, the deft. has his costs. It was objected that the court had no jurisdiction of the action, but the court said it was no question of jurisdiction.

7 Mass. R.  
511, Freeland  
v. Ruggles.

§ 27. Action on a review bond conditioned to pay such sums as the judgment creditors might recover on the review. The defts., after oyer of the bond and condition, pleaded in bar that they had performed all things on their part to be performed. Held, the plea bad, and judgment for the plt.

§ 28. Debt on a review bond,—conditioned to pay the former judgment with 12 per cent. interest, with additional damages and double costs, if the said former judgment should be affirmed in whole ; and if affirmed in part only, to pay the part not reversed, with 6 per cent. interest. Held, this was a good bond, though it secured the original judgment as well as interest, additional damages, and double costs. And the court said, the first judgment was a final judgment, though no execution could issue, and of consequence the attachment, if one in the original suit, was lost by the review : so a reasonable construction of the statute thus to take a bond, to secure also the original judgment.

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9 Mass. R.  
239, Bingham  
v. Pepon &  
al.

§ 29. Bixby & al. recovered judgment in trover against Otis. He gave bond to review, and sued out his writ of review after the service of it, and before its return Otis died. Held, his administrator might prosecute on statute 1788, c. 47, s. 3.

9 Mass. R.  
620, Otis v.  
Bixby & al.

§ 30. This was a review in trespass *clausum fregit*, and destroying the plt's mill-dam. Judgment against three defts. and they reviewed ; and the plt. had, against two only, a verdict for increased damages. The third was allowed to tax costs for travel and attendance for himself and all the witnesses used in the defence, both on the first trial and the review. In this case the original plt's damages were increased on the review, though he did not review.

10 Mass. R.  
56, Durgin &  
al. v. Leighton.

§ 31. This was a review in defamation, the original action was brought up from the Common Pleas by demurrer, and deft. agreed the plt. should have the benefit of a verdict in this court at the first term. Held, by this the deft. waived his right of review, but that the plt. who obtained a verdict in this court, not satisfactory to him, might review. Held also, when the plt. in review is not entitled to it, the court will quash the writ on motion, or abate it *ex officio*, on observing the defect.

10 Mass. R.  
218, Hall v.  
Wolcott.

§ 32. A review commenced and discontinued, is not a bar to another review in the same action, if not prevented by other limitations ;—was compared to a nonsuit &c.

10 Mass. R.  
221, Burrill  
v. Burrill.

§ 33. Petition for a review. Held, a review may be granted on the petition of a trustee, who has suffered a default on a *scire facias*. Was a party interested.

10 Mass. R.  
Packard's  
case.

§ 34. Other cases of reviews and forms of judgment therein, see *Sergeant v. Webber* ; *Bingham v. Cabot, &c.* Judgment reversed in part, first judgment remains good on account of any levy &c. under it, and a cross judgment given for the amount of the part altered, or for what the first was too much.

§ 35. Two counts in a declaration for two several causes. Verdict for the plt. on the second only. Appeal—and second

14 Mass. R.  
366, Rice v.  
Townsend.

CH. 190. trial, he had a verdict on the first count for \$13.38;—for the  
 Art. 1. deft. on the second count. The verdict for \$13.38 was for  
 a much less sum than the plt. had a verdict for in the first  
 trial. Held, he was entitled to a review of the action on the  
 second verdict, as there had been in fact but one verdict  
 against the plt. in each cause of action.

ART. 4. *Bond and other material forms in reviews.* Questions have been often made as to the form of this bond, as in *Bingham v. Pepoon*, in article 3, and other cases. It is material that this bond cover all the rights of the obligee in it; because it has been decided, and correctly, that the first judgment is a *final one*, as in that case, and of course, on the *review*, the original attachment, or bail in the action, is no security, but discharged by the lapse of thirty days after such first judgment; as this is the case, the obligee, the deft. in the *action of review*, ought to have adequate security in this bond for every thing he may recover on the review; the double interest secured by a bond to review an action, is computed only to the time of the judgment on the review; after, only simple interest.

11 Mass. R.  
 407, Bacon v.  
 Otis.

## CHAPTER CXC.

### SCIRE FACIAS—PLEADINGS.

#### ART. 1. *General principles.*

This *scire facias* is a writ that issues in many cases; and its office is to make known to the deft. in it, some matter he has a right by law to be informed of; and to afford him an opportunity, if he sees fit, to show cause why this or that step shall not be taken against him. It is not a writ at all confined to any particular branch of the law, but is in use in many parts of judicial proceedings; and, as may be seen, has already come into view on sundry occasions, as the subject matter required. See Index, *Scire Facias*. Is founded on some record, as judgments, recognizances, or patent.

§ 2. It is a settled principle, that nothing can be pleaded in bar to this writ which might have been pleaded in bar to the original action, upon the general principle that every matter must be pleaded in season. Ch. 29, a. 16, r. 19; Ch. 75; Cowp. 728, *Cook v. Jones*; Cro. El. 283, *Allen v. Andrews*; Salk. 2, *West v. Sutton*; 2 Stra. 1043; 6 Mod. 303;

8 Johns. R.  
 77, M'Far-  
 land v. Irwin.  
 —4 Bac. Abr.  
 408.

1 Bin. 67, 289; 1 Bay, 891; 3 D. & E. 685; 1 Atk. 292; Ch. 190. 1 Wils. 238; 2 Stra. 732; Kirby, 285.

Art. 1.

§ 3. It is sometimes a *new action*, and sometimes a mere *continuation of the former action*; on a judgment, it is always such continuation; Ch. 75, this point largely considered, Cabot & al. v. Bingham, and cases there cited. But *scire facias* is a *new action* in divers cases; as, against *bail*, it is a distinct action, but is always a *judicial writ*.

Lit. s. 505.—  
F. N. B. 267.  
—1 Saund.  
72.—Salk.  
603, Atwood  
v. Burr.

§ 4. So to repeal a patent; and 2 Wils. 251; and Co. L. 290. It is said, though a *scire facias* is a *judicial writ*, yet because the party may thereupon plead, it is accounted in law in the nature of an action; “and therefore a release of all actions is a good bar of the same;” “and wherever a writ requires a plea, it is an action.”

2 Wils. 251,  
Gray v. Jones,  
exr.—Skin.  
682.

§ 5. So in *detinue* against a third person; for he not being a *party to the record*, may plead to the writ as to an *original action*. *Scire facias* against *defts.* as *mainpernors* of Broke, and they pleaded he was dead when the judgment was given. At first held, no plea, as it went to avoid the judgment, which could not be but by error; but on consideration, this plea was received; “because they could not have a writ of error to reverse judgment:” is a *new action*, 6 Johns. R. 106, Gonnigal v. Smith.

2 Salk. 600.—  
Cro. El. 199,  
Warter v.  
Perry.—  
Woodyear v.  
Greesham,  
Skin. 682.

§ 6. So, 2 W. Bl. 1227, held, *scire facias* against *bail* is a *personal action*; and cited Co. L., above; 2 Ld. Raym. 1068.

Pulteney v.  
Townson.

§ 7. Buller J.; “there is no doubt but that a *scire facias* is an action;” and so, held, a plea to it must conclude, “if the plt. ought to have or maintain his action.” *Quare*.

1 D. & E.  
267, Fenner  
v. Evans.

§ 8. These cases, and many more of the kind, are all good law; after all, there is one ground of distinction, that runs through all these cases. It is not properly an action, but the mere *continuation of an action*, whenever it is used to carry into effect a former judgment against a party to it, or to remove an action from a State to a Circuit Court, by a party; and so the party is barred to plea, to the *scire facias*, any thing he might have pleaded to the original action; but it is a *new action*, whenever brought against one not a party to the former judgment, as against *bail*, or on any recognisance &c., for *quoad bail* &c. it is a *new process*, and not to enforce a former judgment against them; on a recognisance, is always an original proceeding.

2 D. & E. 46,  
Winter v.  
Krechman—  
1 D. & E.  
267.—1 D. &  
E. 388, ex-  
ecutors of  
Wright v.  
Nutt in error.

§ 9. It is a maxim, that no one, who is not a party to the record, can be benefited or charged by the process, without a *scire facias*. If the wife be sued alone, and have costs, her husband must sue, *scire facias*, for them; but, see post.

Dougl. 636,  
Wortley v.  
Ragner.—2  
Saund. 6, n.1.

§ 10. It was stated, as a general principle, in this case, that a *scire facias* must pursue the very terms of the judgment it

6 D. & E. 1,  
Mara v. Quin,  
ex.—Kirby,  
220.

CH. 190. is brought to carry into effect. It is now immaterial here, as it is in England, whether *scire facias* lay at common law or not.

Art. 2.

13 E. I. c. 45.

§ 11. Gives a *scire facias* to revive a judgment, and provides that when the judgment is more than a year old, "the sheriff shall be commanded, that he give knowledge to the party, of whom it is complained, that he be before the justices at a certain day, to show, if he has any thing to say, why (such matter enrolled) the plt. ought not to have execution." Gives, also, *scire facias* on a recognisance, after a year and a day.

Jarvis v.  
Rathburn.

§ 12. This writ can only issue from the court where the record is; *Commonwealth v. Downy*, Ch. 150, a. 3; 2 Saund. 72; Kirby's R. 220; is judicial, 9 Johns. R. 259; Sid. 1035; Cro. J. 231.

2 W. Bl. 995,  
Caysgarru v.  
Fly.

§ 13. A judgment of twenty years' standing, may be revived by *scire facias*, but no execution till *scire fecias* returned, or affidavit of *personal* notice to the deft. 2 Saund. 72 n., Underhill v. Devereaux.

2 Stra. 1220,  
Rex v. White.  
—2 Salk.  
598.—Stra.  
813, Barr v.  
Satchell.

§ 14. No *scire facias* on a recognisance, can be tested the day the party makes default; but may be served before the return is out; Stra. 614. Judgment against two, *scire facias* against one, is ill. Where a *scire facias* is returned, not set aside, for want of notice.

#### ART. 2. Where *scire facias* is proper &c.

Several forms  
of pleading in  
*scire facias*, 9  
Wentw. 543  
to the end of  
the volume.

§ 1. Many cases to this purpose, have been cited in different chapters, as Ch. 3, a. 1; Ch. 29; Ch. 75; Ch. 76,—various atters; Ch. 150, on recognisances and judgments; Ch. 138, in error; Ch. 153, pleas; Ch. 163, as against bail, how barred; Ch. 167, a. 2; on judgment, Ch. 146, a. 8; Ch. 185, a. 9, how amended; and on judgment.

10 Wentw.  
Index, 107.

§ 2. So *scire facias* lies on our absconding act; so by an administrator *de bonis non*, against an executor for waste; so against an administrator on a suggestion of waste; so against bail. See the forms in these cases, American Precedents, pages 321 to 326.

8 Mod. 108,  
Pinnoire v.  
Brace.

§ 3. But if A recover judgment against B and C, and they bring error, and B dies, A may suggest this fact on the record, and take out execution on his judgment without a *scire facias*, against the heir or executor of B; for the fact being so entered on the record, it shows how the execution is to be made out.

3 Salk. 319,  
Withers v.  
Harris.—See  
art. 4.—Noy.  
150.—5 Com.  
D. 754.—2  
Saund. 721.

§ 4. If, in ejectment, a year and a day pass, there must be a *scire facias* before a *habere facias possessionem* can issue, as well to the tenants as to the deft.; and, in ejectment, if one of the plts. dies, an execution may be taken out by the surviving plts. without *scire facias*; so in a common case, if one plt. dies after judgment, execution may be sued in the name of both without *scire facias*.

§ 5. If the deft. occasion the delay of more than a year, execution may be taken out without *scire facias*; as in this case, one was sued out after the year, and was supported; because the defts. had occasioned the delay by bills in chancery, for injunctions to prevent execution on the judgment, and by obtaining terms of payment &c.; and the court held, "that the rule of reviving a judgment of above a year old, by a *scire facias*, before suing out execution on it, was intended to prevent a surprise on the deft., and the want of a *scire facias* ought not to be taken advantage of by a deft. who was so far from being surprised by the plt's. delay, that he himself had been trying all manner of methods to delay the plt." Rule, discharged with costs. So if the delay be by a writ of error; and affirmance may be as a new judgment. 2 Saund. 72, c.

§ 6. So *scire facias* lies on a judgment recovered by a judge of probate, on a hearing in equity, against the principal and both his sureties in the probate bond, for execution for the residue of the penalty; or for so much of it as the court sees ought to be paid.

§ 7. The costs, on a writ of *scire facias*, relate back to the first judgment; and where that is barred by the bankrupt's artifice, all these costs also are barred.

§ 8. By section 14 of this act, the courts of the United States have power to issue writs of *scire facias* &c. as cases may require.

§ 9. *Scire facias* to execute the judgment of a deceased justice of the peace. This act provides, if one in the county render judgment in a *civil* action, and die before it be satisfied, another justice of the same county may order the possessor of the record to bring it before him, and to commit him, on refusal, to be examined on oath &c.; and where the record is before such other justice, he may transcribe it into his own book, and it there being attested, is deemed as the original, and he may send back the first record; and having so transcribed the record, he may issue his *scire facias* to the party against whom judgment was rendered, and thereon give judgment for the first debt, and costs, though above £4, put together, and for costs on the *scire facias*; and the party may appeal to the Common Pleas. Justice may issue *scire facias* where the debt is acknowledged &c.

§ 10. This act provides, that if the party neglect one year after obtaining judgment, to take out his execution, or one year after the return of his last execution, to take out his *alias* or *pluries*, he shall sue a *scire facias* (form prescribed, Massachusetts act of October 30, 1784), and cause the adverse party to be served &c., to show cause &c. why execution shall not be done.

CH. 190.  
Art. 2.

2 Burr. 660,  
Michel v.  
Cue & ux.—  
4 Bac. Abr.  
412.—2 Inst.  
471.—5 Co.  
88.—1 Salk.  
332, Booth v.  
Booth.—6  
Mod. 288.—  
Same case,  
Cro El. 416.  
—5 Com. D.  
756.—4 Bac.  
412.

Old forms,  
Bohun. 368,  
376. One  
against the  
pledges in  
replevin.

6 D. & E.  
282, Phillips  
v. Brown.

Judicial act  
of Congress  
Sept. 24,  
1789.  
Mass. act,  
March 11,  
1784, power  
of justices.

Mass. act,  
Oct. 19, 1782.

Mass. act,  
March 17,  
1784; see  
Ch. 75.

CH. 190. § 11. *Scire facias* in outlawry, how executed. See Outlawry.  
Art. 3.

Mass act,  
March 16,  
1784.

Section three provides, where a person is sentenced by a justice, he may appeal to the Sessions, and must recognise to the Commonwealth &c. to prosecute &c.; and if he fail to prosecute his appeal, and produce copies &c., the Sessions may order his default to be noted on their record; and shall certify the same recognisance with the record of the default to the Common Pleas, "to the intent that a *scire facias* may be thereupon issued for the recovery of the penalty."

§ 12. *Scire facias* against bail. See Bail, and above.

As to *scire facias*, that issues on Massachusetts act of June, 1785, because the debtor's title to the real estate levied on, fails &c. See Executions.

1 Wils. 302,  
Earl v.  
Brown.

§ 13. If the plt. die between verdict and judgment, though that is rightly entered, yet a *scire facias* must issue before execution; and if not, and the money be levied; on *scire facias*, it must be paid back.

4 Bac. Abr.  
417, Ferrer  
v. Brooks.—1  
Mod. 188.—8  
Mod. 225.

§ 14. B gets judgment against A, and *scire facias* is sued out, but before executed, A dies intestate, no *scire facias* is necessary to renew the judgment; but execution of his goods may be in his administrator's hands; but in this case, it was said, the goods of the deft. were bound from the teste of the execution; the rule may be otherwise where not so bound.

Cro. Car.  
207, Beau-  
mond v.  
Long.

§ 15. *Husband and wife*,—by and against. If a woman, executrix to J. S. marries, and she and her husband bring debt on a bond in her right, as executrix to J. S. against J. D. and have judgment against him to recover debt, damages, and costs, and, after, she dies, and before execution sued; the husband does not have *scire facias* on this judgment; for though privy to it, he has not the thing recovered; but it belongs to the succeeding executor or administrator; though urged the damages and costs were his, though not the debt.

Cro. El. 844.  
—4 Bac. Abr.  
420.—2  
Saund. 72 c.

§ 16. But if they get judgment for her own debt, and she dies, he, without taking out administration to her, may have a *scire facias*, "for by the judgment it becomes a debt to him;" or without *scire facias* he may have execution in his and her names, as the debt is his.

§ 17. Where the judgment in *scire facias* alters the nature of the wife's debt, so as to entitle, or make him liable, to receive, or pay it. See Baron and Feme, Ch. 19, a. 6, O'Brien v. Ram; and 3 Mod. 186 to 190, where this matter is largely considered. Also 2 Saund. 72.

5 Com D.  
758.—Jon.  
248.

§ 18. If the husband and wife recover lands in her right, and she dies, he shall not have *scire facias* upon the judgment, for though he is privy to it, yet he has no interest in the thing recovered.

§ 19. If a *feme sole* obtain judgment, or there is one against her, and she marries before execution, both must bring *scire facias*, or it must be against both to execute the judgment. CH. 190.  
Art. 2.  
2 Saund. 72 h.

§ 20. If a wife be sued as a *feme sole*, and has judgment for costs, she may sue execution in her name alone, for the plt. is estopped, as he sued her alone. Doug. 637.

*Scire facias* against bail. See Recognisances and Bail, Ch. 150.

§ 21. If there be judgment against A to account, and manucaptors found by him to appear before auditors assigned, no *scire facias* lies against the manucaptors, or bail, without a certificate from the auditors to the court, that he hath not conformed; for the auditors are judges of the cause, and may excuse the non-appearance, or may appoint a longer or shorter day, as they see fit. 4 Bac. Abr. 420.

§ 22. The bail may plead the principal died before the return of the *capias* against him; or before judgment against him, as they cannot have error to reverse it;—so that he surrendered himself, or his bail rendered him; and all this to the *scire facias*. But then a render or surrender, to be well pleaded, must add the plt. or his attorney had notice of it, in order that the plt. may charge the principal in execution, if he pleases; and that the plt. may be at no further trouble or charge in proceeding against the bail;—and both the principal and bail are liable, till one or the other has paid the debt. 4 Bac. Abr. 420, 421.  
Moore, 888.

§ 23. *Assignees of bankrupts*. After the plts. obtained an interlocutory judgment, they became bankrupts, and afterwards proceeded to final judgment. Their assignees brought *scire facias* to have execution; and on demurrer, they had judgment. The doubt was, if they should not have begun at the interlocutory judgment, and sued out a *scire facias* on that, which was on promises, and prior to the writ of inquiry. It seems the assignees might have had a *scire facias* on the interlocutory judgment, before final judgment; but as the bankrupts had obtained that, and the assignees recognised it to be valid, by bringing their *scire facias* on it, as it was a judgment rendered by a competent court, and remained unreversed; and the assignees had a clear right in equity and justice to recover the debt; and as every act of a bankrupt in favour of his creditors, is to be supported, if possible, on principles of law, the court decided that this *scire facias* was well sued out. 2 Wils. 372,  
Hewit & al.  
v. Mantell.

§ 24. *Letters patent*. *Scire facias* to repeal these. See 2 Saund. 72  
Dyer, 276; 2 Vent. 344; 6 Mod. 229; 3 Lev. 222; Stra. &c.  
43; 4 Inst. 88; 10 Mod. 258 &c. Several cases. *Scire*

CH. 190. *facias* lies on a judgment in a real action. So it lies upon a judgment *quod computet*. 1 Vent. 258. When the party must have *scire facias* to enforce payments in cases of annuities. See Annuity, Ch. 140.

6 East, 550,  
Willoughby  
v. Swinton.  
—[But 2  
Stra. 957.—  
2 W. Bl. 706.]

Collins v.  
Collins.

Mass. Act,  
March 1,  
1779.

2 Saund. 6,  
Jefferson v.  
Morton.—1  
Ld. Raym.  
246, Queen  
v. Ford.—2  
Stra. 866,  
Stewart v.  
Smith.—3  
Johns. R. 514.

Stra. 631,  
Morfoot v.  
Chevers & al.  
1 Wils. 248,  
Goldisworthy  
v. Southcoll.

Bagnal v.  
Gray.

7 Mass. R.  
208, Brown  
v. Wallace.

§ 25. A bond was given conditioned to pay, by instalments, certain sums, as £50 a year till £494. 4s. 5d. was paid. Held, after judgment on it for default of payment of one instalment, and another became due after, the plt. could not take out execution for it, though within the year after such judgment; but was obliged to sue out a *scire facias* to revive it. And they relied on this case of an annuity, and said there could be no "difference between a bond to secure an annuity for life, and a bond to secure a certain number of annual payments for so many years."

§ 26. So this act, as to remedies in equity, provides, when judgment is had for the penalty—conditions to pay at several times—a *scire facias* must issue for each after payment, as it becomes due. And 2 Saund. 72 g. So if the condition be to perform covenants &c., afterwards successively broken.

§ 27. The general rule is, "that where a new person, who was not a party to the judgment or recognisance, derives a benefit by, or becomes chargeable to, the execution, there must be a *scire facias* to make him a party to the judgment or recognisance." 2 Lord Raym. 768; 1 Salk. 319; 2 Inst. 471. Same rule repeated, 2 Saund. 72 i, and many cases cited, founded on it; but some exceptions where the remedy survives, a. 2, s. 4, a. 3, s. 11. May be sued against bail the day the *ca. sa.* is returnable. Presumed to be issued after the officer's return to the writ against the principal. *Scire facias*, in chancery in New York, is a proper remedy by a second patentee, to vacate the first letters patent of the State granting land. So a bill or information, 10 Johns. R. 23.

#### ART. 3. *Proceedings in scire facias.*

§ 1. In a *scire facias* on a judgment recovered by an executor, the death of the testator need not be shewn.

§ 2. The deft. died after the inquiry executed, and before the return. Held, the *scire facias* against the executor must be to shew cause why the damages assessed should not be adjudged to the plt. 6 Mod. 144, Smith v. Harmon; 1 D. & E. 388.

§ 3. 2 W. Bl. 1110. *Scire facias* to revive an old judgment; no execution shall be issued on this *scire facias* till a *sci. feci* is returned, or an affidavit of notice.

§ 4. An execution delivered to the sheriff who returned the original writ, and a return of *non est inventus* by him, is sufficient to maintain a *scire facias* against the bail, though the principal live in another county.

§ 5. The judgment above a year, and afterwards the deft. consented, in writing, that an execution issue without reviving the judgment by *scire facias*. Execution not set aside for irregularity, at the instance of a third person, who alleges that the judgment has been kept on foot collusively, and the execution issued fraudulently to injure him, but he must seek his relief in the court of chancery, or by bringing the question of fact, as to the fraud, to a trial, by an issue at law. Judgment on *scire facias* to repeal a patent, may be by confession, or on default.

CH. 190.  
Art. 3.

3 Johns. R.  
20, 22, How-  
land v. Ralph.

Dyer, 197.

§ 6. Judgment was recovered against Crosby, and thereon issued a *scire facias* against Camp and Townly as his ter tenants, and was returned by the sheriff that he had given due notice to the tenants of the land of which Crosby was seized &c. to appear &c. on the 5th of May, 1807. A rule was entered for the tenants to appear. May 9, their defaults were entered, and May 15, 1807, a final judgment was entered for the plt. Held, the ter tenants were too late, after judgment by default, to move to set aside the proceedings on the *scire facias*, on the ground that the heirs and personal representatives of Crosby had not been warned, or because that they were not such ter tenants as ought to have been summoned, especially when no merits were disclosed by them, and the proceedings were regular.

3 Johns. R.  
86, Whitney  
v. Camp &  
Townly, ter-  
tenants of  
Crosby, de-  
ceased.—2  
Saund. by  
Wms. 9, n.  
8, and 10.

§ 7. Holt had judgment against Lea, and had a *scire facias* to the ter tenants, who appeared, and plead verdict and judgment against them. Holt became bankrupt, and the commissioners assigned the original judgment to the plt. Plummer. He moved it might be entered, to entitle him to the benefit of the judgment on the *scire facias*. This was done without bringing a new *scire facias*.

5 Mod. 89,  
Plummer v.  
Lea.

It seems agreed that if the parties agree to stay execution a year, or if the deft. suspend it a year &c. by a writ of error, the plt. within a year after, may take out one without a *scire facias*; but in this case the court said it would not take notice "of your chancery injunctions;" this makes the difference that appears in several cases. Injunction is not matter of record, but error is. Stra. 301.

6 Mod. 288,  
Booth v.  
Booth.—Cro.  
El. 416.—2  
Cro. 364.—2  
Saund 72 f.  
—And 6  
Mod. 14, 288.  
—7 Mod. 64.  
Salk. 600.—  
4 Bac. 412.  
4 Bac. 413,  
Haw v. Cat-  
ton.—2  
Saund 72 f.

§ 8. If the plt. delay to execute a writ of inquiry till a year after interlocutory judgment, he cannot do it after, without a *scire facias*. But as to injunctions, Michel v. Cue above, is now the law.

§ 9. Only a *scire facias*, and not a *capias*, lies on a recognisance; for recognisances are viewed as judgments, being obligations solemnly acknowledged and entered on the record, and the *scire facias* on those is a judicial writ and proper remedy. See Recognisances, Ch. 150.

Brown, 83.—  
4 Bac. Abr.  
413.

## CH. 190.

## Art. 4.

2 Inst. 395.—  
2 Rol. Abr.  
408.—4 Bac.  
Abr. 414.

§ 10. If two acknowledge a recognisance, and each of them, and so jointly and severally, the conusee may sue several writs of *scire facias* against the conusors on this recognisance; but cannot sue two, if three bind themselves jointly and severally; for the suit against two is neither joint nor several; and this is not in abatement, as it is matter of record; as it is in case of a bond, for the court presumes the three did not seal the bond.

2 Inst. 471.—  
4 Bac. Abr.  
416.—2  
Saund. 6.

One, no party to the record, recognisance, or judgment, as heir, executor, or administrator; though privy, has no writ of execution; though within the year, without *scire facias*; and so of tenant or deft.; for here is an alteration of the person, and hence of the process. The *scire facias* is necessary to make such a party to the suit; and it is a general rule, wherever a new party is to be named in the execution, not named in the judgment, there must be a *scire facias*.

4 Bac. Abr.  
416.—5 Mod.  
338, 339,  
Brace v.  
Pennoyer.—  
1 Salk. 319.  
—Carter,  
112, 193,  
180, 122.—  
Moore, 367.  
—1 Wils. 302.  
—Doug. 614.  
—Noy. 150.

§ 11. But if there be two plts. in a personal action, and one dies, this does not put the other to a *scire facias*. So if one of the defts. dies, because the same party still remains on the record; but the death must be suggested on the record. As in trespass, judgment in the Common Pleas against three defts; they brought error in the K. B. and one of them died before the record was certified; and after his death a *capias ad satisfaciendum* was taken out against the two survivors, without a *scire facias*. Held, the fact of his death ought to be suggested on the record, then execution against the survivors. Lord Raym. 244; Comb. 441; 6 Mod. 108. For if a *scire facias* issued, still the execution must be against the two.

Cro. Jam. 4,  
Yare v.  
Gough, and  
394.—4 Bac.  
417.—5 Com.  
D. 757.

§ 12. Before 17 Ch. II. c. 8, it was held, if an administrator of A got judgment against his debtor; and then this administrator died, the administrator *de bonis non* could not have *scire facias* on this judgment, for want of privity, but must begin a new. Three judges against one. Same principle, Ch. 29, a. 8, Grout v. Chamberlain. But if an administrator, during an executor's minority, get a judgment, he, when of age, may pursue it, for he is privy to the judgment.

6 Mod. 263.

It is a general rule that the *scire facias* is amendable wherever the original is; and generally a *scire facias*, being a judicial writ, shall not abate for want of form.

ART. 4. *Pleadings in scire facias.*

2 D. & E. 46.  
—Co. Lit.  
291.—10  
Mod 112.—4  
Bac. Abr.  
423.—2 Ins.  
479.—Lucas,  
112.—Cowp.  
728.

§ 1. Whether viewed as an original or judicial writ, it is so far an action, that the deft. may plead to it; and may be barred by a release as above; and one may plead in bar or abatement to a *scire facias*, as well as to other actions. The plea in bar is always concluded by an *executio non*, as in other cases by an *actio non*. See conclusions of pleas above; and

art. 1. But the deft. in *scire facias* cannot plead usury, or other matter he might have pleaded in the original action, as stated above; nor the plt's. alienage &c. for the same reason. CH. 190.  
Art. 4.

§ 2. But cases in B. R. 499, it is said the deft. in *scire facias* in ejectment, may dispute the plt's. original title, though not in debt; and 12 Mod. 499.

This statute enacts, "that where an action of debt shall be brought upon any single bill, or where debt or *scire facias* shall be brought upon any judgment, if the deft. hath paid the money, such payment may be pleaded in bar." 4 & 5 Anne,  
c. 16, s. 12.

§ 3. If a recognisance is given for good behaviour, the party cannot be indicted for a breach of the recognisance, before a *scire facias* issued upon it; for he may have a good plea for his excuse, and ought to have an opportunity to plead it, before he is indicted. 5 Com. D.  
Pl. L. 1.

§ 4. A *scire facias* ought to be as short as possible; hence, it is sufficient, though it be as general as the record upon which it is founded. Mod. Cas. 296; and an immaterial variance from the record does not prejudice. But a *scire facias* must recite the judgment that was given, and before what judge. Salk. 598; and see note a. 2. 5 Com. D.  
755.—3 Mod.  
227.—Cro.  
El. 817.

§ 5. If a recognisance was taken before a judge, and not entered in court, and the plt. declares on it, as in court, it is a variance that cannot be amended. Salk. 52, 564,  
639.

§ 6. A *scire facias* against tertenants, need not shew by what judgment they entered. 1 Lev. 312. And need not recite all the proceedings upon which the judgment was founded, but the judgment only: must not be tested on Sunday. Dyer, 168. Carth. 69.

§ 7. The sheriff's return of *scire feci* does not estop the bail from shewing that they were summoned so late on the return day, that they could not bring in their principal before the rising of the court. 2 D. & E.  
737, 738, n.  
Pool v. Wells.

§ 8. The year is computed from the expiration of the time given in a *cessat executio* on a judgment. Mod. Ca. 288.

§ 9. The deft. in *scire facias* may plead no such record: so that it is brought against the administrator of a deceased contractor, where it should be against the survivor. 5 Com. D.  
761.—1 Salk.  
262.

So the deft. in *scire facias* may plead a release to his testator or to himself; or a release by the executor of the plt.; or by one executor, or administrator; or to one executor, or administrator. 3 Lev. 272.

§ 10. But it is no plea for the deft. to say that the plt. by deed agreed, that if he obtained judgment, he would not take out execution, if the deft. paid £100, which money he had paid; for there can be no defeasance to a judgment, before it is given. Cro. E. 837.

§ 11. So the deft. in *scire facias*, may plead that a writ of error Skin. 590.—  
Cro. Car. 328.

CH. 190. is pending on the original judgment ; or that the plt. levied debt  
 Art. 4. and damages against the testator.

1 Lev. 30.—  
 Mass. S. J.  
 Court, Essex,  
 June, 1799,  
 Fellows v.  
 Adams & al.  
 5 Com. D.  
 762.—Co.  
 Ent. 620, 621.

§ 12. Judgment against A & B, and one dies, a *scire facias* lies against the survivor ; and it is no plea, the deceased has an heir to whom assets descended. See a. 3, s. 11.

Judgment against three defts. one died, *scire facias* against the two survivors.

§ 13. *Tertenants*. It is a general rule, that the tertenant may plead in bar to the *scire facias*, any matter which shews his lands not liable to execution ; as the heir has sufficient by descent whereof the plt. might have execution ; that the original deft. never was seized of the lands in the tenant's possession ; or he was only tenant in tail and died, and his issue levied a fine to the tertenant. Many other pleas of this sort are found in the books, but they are but very little in use in this country, so not material here. The tertenant cannot plead in abatement, as he is no party to the suit.

2 Saund. 73  
 P.

Story's  
 Pleadings,  
 447, 455.

§ 14. In these pleadings are several valuable forms of pleas in *scire facias* ; as payment on a judgment, and replication, *nul tiel record* ; and replication, *tiel record*, by administrators ; that the judgment was obtained against the intestate and B. B., and that he survived ; that the judgment has been reviewed and reversed in part. Pleaded at large and demurrer thereto, as, in substance, Ch. 227, a. 4. A plea by bail, the principal was ready to surrender &c. Replication &c. Plea, he died before execution issued ; replication and rejoinder. Plea by administrators on suggestion of waste, and replication.

And many  
 forms in  
*scire facias*,  
 Tidd's Prac.  
 Forms, 440  
 &c.

*General conclusions from the foregoing cases &c.*

3 Burr. 1791,  
 Knox v. Cos-  
 tello.—2  
 Stra. 607.

§ 15. It is certain that "damages for delay of execution cannot be given in a *scire facias* ;" nor could costs, till the statute of 8 & 9 W. III. c. 11 ; but 6*d.* mere nominal damages, as a foundation for the costs *de incremento*, are as no damages.

2. The plt. in concluding his *scire facias*, ought to distinguish well between the last step taken regularly in the suit while the party was living, and the next step to be taken after his death ; as if the deft. dies after judgment, the plt. ought to conclude his *scire facias* against the deft's. executor or administrator, according to the state of the cause when he died, or as after interlocutory judgment and damages assessed on a writ of inquiry ; but before final judgment, the plt's. *scire facias* against his executor, ought not to conclude, to shew cause wherefore a new writ of inquiry should not be awarded ; for this step in the cause was well taken in the deft's. lifetime, as the damages were assessed before he died, but the conclusion must look forward to the next part in the cause to be

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acted upon, and therefore call on this executor to shew why the damages assessed should not be adjudged to the plt. ; or if legally adjudged to the plt. in the deft's. lifetime, then conclude to his executor &c. to shew cause why execution on the judgment should not be issued ; but if the deft. dies, after the writ of inquiry awarded, but before it is executed ; then to shew cause why the damages ought not to be assessed and recovered. The same principle runs through all the cases, as to parties and matter ; and therefore, the plt. in *scire facias* must always recite the last thing legally done, the last point legally settled in the cause, at any rate, whatever else he may recite or omit ; for it is the very office and end of this writ of *scire facias*, to call on the deft. in it, to begin at, and proceed from, that point to the end of the cause.

§ 16. 3. Wherever a death of a party, or of one or more of a party, is entered on the roll or record, the case is legally altered, and thereby different parties made, to which in their altered condition, the after proceedings and judgment in the suit has relation, and the execution issues out of this altered case, and without *scire facias*, because this altered case itself gives the clerk the form of it ; [but where the death of a party, or one of a party, abates the suit, see Abatement &c.]

§ 17. 4. Though otherwise held anciently, now if there are two or more plts. or defts. in a personal action, and one or more of them die *after* judgment, execution by *fieri facias*, or by *cap. ad. sat.* may be had for or against the survivors, without a *scire facias* ; but the execution must agree with the judgment, and so the execution must be sued out in the joint names of the plts. or defts. as they were on the record when the judgment was rendered, otherwise the execution will not be warranted by the judgment. See a. 3, s. 11.

§ 18. 5. Wherever, by a death in a suit, a *scire facias* must issue, and a wife become a party in it in her own or another's right, her husband must be joined with her ; and whenever by death there is no plt. or deft. surviving in any stage of the proceeding in a suit, before property actually seized, or body taken, to satisfy the execution, there must be a *scire facias* ; for the officer proceeds to satisfy the execution, by taking property or the body, on the ground only, there is a deft. in existence ; and a plt. to direct, elect, accept, &c.

§ 19. 6. *As to patent.* All patents granted by the king or by our president &c. are matter of record, as grants of the government ; and if issued wrongfully, and to another's prejudice, or are acted upon by the patentee after forfeited or become void, a *scire facias* may issue to him in order to the declaring on record the same null and void, or to repeal the same, as the practice is in England. In this country, but few

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or no offices are held by patent; but usually by commission; and if one exercises an office he is not entitled to a *quo warranto* issues as above; and if one illegally use a patent-right to the prejudice of another, his usual remedy is an action; but if the wrong be such as to produce a multiplicity of actions, it is conceived a remedy may be had here, as in England, by such *scire facias*; and where a patent is prejudicial to the subject, a *scire facias* is held to be a writ of right, to repeal it.

Kirby, 220.

§ 20. 7. A *scire facias* is always from the court where the record is originally, or by removal. The rule, that it is not amendable, holds only where there is no sufficient matter to amend by; or perhaps where it is founded on a certain record, and the deft. has pleaded *nul tiel record*. See Amendments. Must be fifteen days between the *teste* of the first and return of the second.

Coleman, 54.

§ 21. 8. To *scire facias* against bail in the action, they may plead any matter that shews it issues on no such record or any discharge to the principal, or to them, or payment by him or them; as that there is no such record of the recognisance, or of the judgment against the principal &c., or a release of the judgment to him or them; or payment of it by either; but not the principal's inability, as bankruptcy &c.: so the bail may plead their discharge by the timely surrender of the principal; or that he died before the bail was fixed; or within the time of surrender &c.

§ 22. 9. To *scire facias* on judgment or recognisance, the deft. may plead not only *nul tiel record*, but any matters that shew there ought to be no further execution, or execution issued; as payment; or a release of the debt or damages; or the same levied; or body taken in execution, and discharged by the plt's. consent &c. If the plt., who sues out a *scire facias* to revive a judgment do not proceed on it in a year and day, it is a discontinuance; and after returned and default entered for not appearing and pleading, the plt. allowed more than a year and day to elapse before he entered judgment. Held, a discontinuance. 9 Johns. R. 79. Nor can one be issued to revive a judgment of more than ten years' standing, without affidavit &c. 84.

§ 23. 10. If to the *scire facias* the deft. has any good matter in bar, and neglects to plead it after *scire facias* returned, he loses the benefit of such matter forever; but after the *nihils* returned, he may help himself by *audita querela*, or on motion.

§ 24. 11. Whoever holds lands &c. by matter of record, cannot be ousted, until he, by *scire facias* &c. has had an opportunity to answer and defend in a court of record, except he holds on certain specified terms, which, by mere calculation, fix the time of his possession.

§ 25. No defence to a *scire facias* against bail, that their principal has enlisted into the army of the United States since they became bail for him, and before judgment against him in the principal's action. 11 Mass. R. 146. CH. 190. Art. 4.

§ 26. *Sundry matters not to be objected to scire facias.* *Scire facias* against bail; and, held: 1. It is no sufficient defence, that a former and original execution was not delivered to an officer before it was returnable: 2. Nor that *non est inventus* was not returned on that execution: 3. Nor that no execution was delivered to the officer within thirty days from the rendition of the judgment: 4. Nor that the principal abode in the county, ready to be taken in execution, from the rendition of the judgment until the first execution was returnable: 5. Nor that the *alias* execution, on which the *scire facias* is grounded, was not delivered to an officer four days before it was returnable: 6. Nor that the bail had no notice the execution was in the hands of an officer: 7. Nor that the plt. refused to deliver the execution to an officer, when requested by the bail; was on a judgment in the Common Pleas; to the *scire facias*, the deft., the bail, pleaded eight pleas in bar, seven to the above effect: 8. That the *non est inventus* returned on the *alias*, was obtained by fraud, by the plt.; issue to the jury. The material principle on which this case was decided, seems to be, that the judgment creditor is not bound by law, to endeavour to get his judgment satisfied by the principal, the judgment debtor, until a reasonable time for the officer to do his duty, before the expiration of the year, during which the bail is liable. 12 Mass. R. 434, Stevens v. Bigelow.—*Scire facias* in New York cannot be sued after ten years, without affidavit the debt is not paid; Ch. 190, a. 4, s. 26, Lansing v. Lyons.

§ 27. To a *scire facias* against an administrator to have execution of a former judgment, recovered against him in that capacity, he pleaded the insolvency of the estate of his intestate, as established *since* the recovery, and the plea was adjudged good; was on a judgment in the Common Pleas; execution returned, and suggestion of waste, and prayer for execution against the deft. *de bonis propriis.* *Scire facias* was returnable, and entered in the Common Pleas, December term, 1812; plea in bar in that court of insolvency &c.; to this the plt. demurred generally; decision below, and appeal; such a plea is bad in England; but is good in this State, when regular proceedings of insolvency are had in a probate court, which proceedings must make a part of such a plea fully and correctly stated in it; of course, the first judgment against the administrator is not conclusive against him, if an insolvency be afterwards discovered, and properly pursued; and it is no fault of his, he does not know the estate is insolvent at the time of such first judgment. 12 Mass. R. 570, Coleman v. Hall, admr.

§ 28. A *scire facias* being an action, a conclusion *actio non*, though somewhat informal, yet will not vitiate the plea. The 2 Wils. 251, Grey v. Jones

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plea was that the plt. ought not to have his *action*, instead of his *execution* &c., by virtue of the recovery aforesaid; and where a plea is informal in its conclusion or beginning, but the pleader prays right judgment, the courts have always rejected the informal words, and given judgment according to the right and merits of the cause.

14 Mass. R.  
386, Wood-  
cock v.  
Walker.

§ 29. The Common Pleas ordered the father of a bastard child to pay towards its maintenance \$1.50 a week &c.; and that he give a bond, with sufficient surety or sureties, to pay said sum; also a bond to the town of Needham, for its indemnification, and pay costs; he neglected to perform the said order. Held, *scire facias* does not lie on such order, being merely an order he give security &c., and the only mode to enforce it was, to commit him until he complied; and held, also, that "a writ of *scire facias* lies only to obtain execution of a judgment."

15 Mass. R.  
230, Winchell  
v. Stiles.

§ 30. *Scire facias* against Stiles, as bail of Joel Clark, on execution issued against him; the officer returned *non est inventus*, and held conclusive; though Stiles pleaded that Clark was always &c. abiding in the officer's county, ready and willing to have rendered his body in execution of the judgment, and did not avoid, but might have been found and arrested by the officer &c.; and the plt. demurred generally to this plea; and held as above.

16 Mass. R.  
322, Shillabar  
v. Wyman;  
like principle,  
8 Johns.  
R. 126; and  
the old cases  
denied to be  
law, 3 D. &  
E. 687.

§ 31. This was *scire facias* on a judgment against an executor *de son tort*, to have execution of it *de bonis propriis*, on a suggestion of waste &c.; deft. pleaded in bar of execution, that before suing out the *scire facias*, he was duly appointed administrator; that said estate of the deceased is insolvent &c.; stated the proceedings, decree of insolvency, and distribution, &c. Held a good plea to bar the *scire facias*, though the deft. took administration after the original action was brought against him; and on the ground, "that on executor *de son tort*, may purge the wrong by a rightful administration, under letters lawfully granted;" 325, *plene administravit*, pleaded in another case by each executor, according to our acts of insolvency; and held good.

4 Maule &  
Sel. 33, Wil-  
kinson & al.  
Thorley & al.

§ 32. *Scire facias* against two defts. to have execution on a recognisance of bail for £449. 10s. damages and costs, recovered against Joseph Blount thereon, conditioned in case the said J. Blount and George Kirkham *should be condemned*, that they pay &c. or render themselves. The plts. allege, that J. B. & G. K. have not paid &c. or rendered themselves, according to the form &c. of the recognisance; and special demurrer; and held the breach ill assigned; for *non constat*, but Joseph Blount condemned, paid or rendered.

1 Caines' R.  
118.

§ 33. On *scire facias*, notice of the entry of the rule to appear and plead, need not be given, and default may be entered on the expiration of the rule.

## CHAPTER CXCI.

## PLEADINGS—PARTITION.

ART. 1. *General principles.*

§ 1. Partition, and the pleadings therein, are, in some cases, founded on the principles of the common law, and sometimes on statutes; and sometimes on the deeds of the parties concerned; sometimes are by writ of partition; and sometimes by petition.

§ 2. In whichever way made, it is a division of lands held by two or more joint tenants, tenants in common, or *parceners*; and in whichever of these ways the partition is made, either by deed or act of the parties, or by some court, as the Supreme Judicial Court, Common Pleas, or Probate Court, each one takes a distinct part in severalty.

§ 3. Partition is a form of conveyance among such privies in estate, and sometimes operates as a *grant*, and sometimes as a *release*.

§ 4. In all these cases there is a unity of possession, which is severed in the partition, however made; and since the statute of frauds, no partition can be made by *parol*; but every partition, to be valid, must be by deed, or on warrant duly issued by some proper court; and the law will not presume a deed of partition, merely from the circumstance of several possessions; *Porter v. Perkins*, Ch. 113, a. 2; and the effect of partition; see *Allen v. Cook*. Willes, 253,  
Johnson v.  
Wilson; and  
Ch. 13, a. 10.

§ 5. In partition in the *same* petition, the plt. may have assigned him different proportions in different tracts of land, as two thirds of one tract, and one half of another, &c. 2 W. Bl. 1134,  
Hatton v.  
The Earl of  
Thanet.

§ 6. Several material principles in partition have been already considered, as applicable to seizin and disseizin, and other subjects, as Ch. 104, a. 3, *Cook v. Allen*; Ch. 113, a. 2, partition by deed and by act of law; Ch. 132, a. 8, *Wells v. Prince*, deciding one who has a right of entry, may petition for partition, settled in a suit by petition for partition; Ch. 134, a. 4 and a. 6, as to tenants in common &c.; partition by writ, by deed, &c., Mass. act, March 9, 1786, c. 62; as to waste &c. by them; the writ of partition by them at common law; and the Province acts of 1693 and 1727, on these subjects; Ch. 149, a. 2, *Sever v. Sever*, how probate partition is open to objections on an appeal. 14 Mass. R.  
434, like  
principle.

CH. 191. § 7. In partition among tenants in common, the plt. need  
 Art. 2. not state the deft's. title, for they claim by several titles, and  
 one is not *conusant* of the title of the other; and to this declaration the deft. may plead he does not hold together. 5 Com.  
 D. 713; Cro. El. 64, Yate & al. v. Windham in error.

3 Salk. 208. § 8. Tenants in common were not compellable to make partition before the statute of H. VIII.

§ 9. Where a tenant in common of land in a propriety incorporated, is entitled to partition, see Ch. 176, a. 4, Oxnard & al. v. K. P.

Bonner's case, 4 Mass. R. 122. § 10. Petition for partition ought not to include lands in different counties.

2 Com. D. Chan. 4 E. § 11. In chancery no commission is granted to set out lands in partition, if the deft. denies the plt's. title, and says, he has none of his lands in his, the deft's., possession; as in such case chancery has no process to try and decide the title properly.

ART. 2. *Petition at common law.*

31 H. VIII. c. 1.—Co. L. 167.—5 Com. D. 713, Tay. for v. Layer. —32 H. VIII. c. 32.—Cro. El. 759, Moore & al. v. Onslow.—Dyer, 52.—Co. Lit. 166, 169, 171.—Lit. Sect. 255, 256, 390. § 1. By this statute, and at common law, partition must be against the tenant of the freehold; but the writ may be general; Cro. El. 743; *that they hold together and undivided*. See the statutes, art. 6. But by this statute, a writ founded on it, between joint tenants and tenants in common, of a particular estate, ought to be special, showing their particular estates; but a writ founded on 31 H. VIII., though general, as above, is good; for this statute prescribed no form, but left it to the clerks in chancery to frame the writ, and they devised this general form, adding only the words against the form of the statute; but the writ stated the plt. and deft. held *in fee*, but the verdict found the deft. held *in tail*, and in this respect the writ was deemed bad, for though the plt. need not take notice of the deft's. estate, yet if he will do it, and mistakes it, he fails, and his writ must abate. Unequal partitions are voidable only, and this only in special cases.

Rastel's Entries, 449 &c.; an eviction of a life estate defeats a partition, Yelv. 8. § 2. Accordingly the count in partition was framed, wherein P. stated he and D. held in common and undivided, twenty acres of land, with the appurtenances, of the inheritance which was B's., father of the said D., and grandfather of said P., to wit, father of L., father of said P., whose heirs they are; wherefore it appertains to said P. to have one moiety of said tenements, with the appurtenances in two equal parts, to be divided; and it appertains to the said D. to have the other moiety thereof to hold in severalty, so that the said P. and D. may separately hold and enjoy said respective moieties, in severalty, yet the said D., though required to make partition of said land &c., unjustly refuses so to do, and will not permit the same to be made, to the damage of the said P.

§ 3. When the second section of this act enacted that persons holding lands &c. as tenants in common, joint tenants, or *coparceners*, might "be compelled, by writ of partition, at the common law, to divide the same," the legislature must have intended our common law, including said statutes; because, as to tenants in common, and joint tenants, there was no such writs at the common law, as understood in *England*; as none lay to compel them to make partition before the said statutes were enacted: though these writs of partition, at *our* common law, are rarely brought, yet, by law, they may be; and 15 Mass. R. 155.

§ 4. And, as in the margin, a writ of partition was brought; the plt. stated he was seized of an island, in common with the deft.; the verdict found the plt. was so seized, and judgment accordingly, and a warrant issued to the sheriff to impanel a jury of twelve good and faithful men, to make partition &c., who were sworn to make partition, and made return; and the deft. dying after the first judgment, and before partition made, notice was given to his executor and devisee, to be present at it, and said the costs might be levied, and the second judgment entered, notwithstanding the death of the deft.; and 3 Bac. Abr. 213, it is said, if the deft. die after the first judgment, and before the second, the partition is valid.

§ 5. So in this case the Commonwealth brought a writ for partition of the old State House in Boston, and land under it. Notice was given to all persons interested &c. The inhabitants of Boston, by their agent, appeared, and pleaded that they were *sole* seized, and traversed that the Commonwealth was seized of any part, and issue. The court went fully into the title. The State's claim was reduced to one moiety. The jury was drawn from Hingham and Chelsea, the other towns in the county of Suffolk, besides Boston, that town being a party. This dispute was afterwards settled by reference. It is very clear that only persons seized and possessed of the lands can have this writ; for it is grounded on our said statute of March 9, 1786, as above; and that speaks only of persons having, or holding the lands; but it is otherwise as to a petition for partition, founded on the act to be stated presently. That allows any person interested with others in any lands &c. to have a petition for partition, though the better opinion is, the petitioner must have a right of entry.

§ 6. At common law, and before the 31 and 32 H. VIII., the writ of partition was confined to *coparceners*; but it lay against the alienee of a coparcener. As one could not by her alienation divest her sister's right to divide the estate; nor destroy her writ of partition. But this alienee had no such writ; nor had the tenant by the curtesy any such writ, though

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Mass. act,  
March 9,  
1786.—Maine  
act. Ch. 37.

Mass. Sup.  
Jud. Court,  
term, 1797,  
in Middlesex,  
Tyng v.  
Tyng.

Mass Sup.  
Jud. Court,  
August term,  
1801, The  
Common-  
wealth v.  
Inhabitants  
Boston.

Co. L. 175 a,  
167 a.—  
Dyer, 98 b.

**CH. 191.** he came in by act of law, but it lay against him by the surviving coparceners. But the writ of partition generally in England, was founded on the statutes of H. VIII;—and the 32 H. VIII. enables even tenants for years, holding in joint tenancy, or in common, to make partition; and as partition binds only possession, not the mere right of property, it behoves every one concerned in partitions, to look to his title, before he makes large and expensive improvements on the estate divided; the prevailing opinion among the people is quite otherwise. See *Allen v. Cook*; *Bonner's case*; also *Wells v. Prince*.

15 Mass. R.  
156, *Mussey*  
v. *Sanborn*.

§ 7. And lately it has been decided that a tenant for years may have partition on petition, though the respondent be seized in fee. This decision seems to be widely different from that in *Bonner's case*. However, it is conceived that the petitioner must have a right of entry, be his estate for years or larger. Must have an interest on which he can legally enter.

**ART. 3.** *Massachusetts statutes as to partition on petition.*

§ 1. Massachusetts statute, providing for partition by writ, has been stated already, Ch. 134, a. 6. The United States have no statutes on this subject, and it is not known that there has been any process for partition of lands in the courts of the United States; and if it shall become necessary for them to make partition of lands in the Federal districts, it is probable they will adopt the laws of the State in which they lie, as local usage.

C. & P. Laws,  
258.—Mass.  
act, A. D.  
1693.

§ 2. This act provided for partition of lands &c. in the same manner as the said act of March 9, 1786, does, by writ at common law.

C. & P. Laws,  
568; and  
603, A. D.  
1753.

§ 3. A. D. 1748, an act was passed for making partition of lands, on petition, of any person "interested with others in any lot or grant of land" &c., by application to the superior court in any county. Then provided for the same mode of proceeding as now exists in the Commonwealth's law. The act of 1753, merely made provision as to costs and further notice.

C. & P. Laws,  
626.

§ 4. In 1760 an act was passed, providing that partition might be made by three or five freeholders; and for assigning, in certain cases, more than his share to some one party, not a minor, he "paying for owelty of partition," as the law now is.

In the year 1784 &c., these laws were revised, and not materially altered.

Mass. Act,  
March 9,  
1784, Pro-  
bate parti-  
tion.

§ 5. Sect. 4 & 5 provide, in regard to intestate estates, that the widow have her dower assigned her, and after debts &c. paid, "the judge of probate &c. of the county where the

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deceased was an inhabited or resident, at the time of his death, shall cause the residue, whether it be situated in the county in which he is judge, or any other county in the government, to be divided, and partition thereof to be made among the children, or heirs, as this act directs." Then excepts advancements &c. See Advancement. Also provides for estates by the curtesy. See Curtesy. "Provided, that when the real estate cannot be divided among all the children, or their legal representatives, without great prejudice, or spoiling the whole, the judge of probate may order the whole to the eldest son, if he accept the same, or to any other of the sons successively, on his refusal, he paying unto the other children of the deceased, their equal and proportionable shares of the true value thereof, upon an appraisement, to be made by three disinterested freeholders, appointed by the judge for that purpose, and under oath;" or giving security to pay the same, as the judge shall direct &c. The act of 1818 empowers the judge to assign to one or more of the heirs or devisees, "preferring males to females," "and elder to younger sons," among children of the deceased. Sect. 6 provides, that the judge may settle the real estate on as many of the children or heirs as it will accommodate conveniently, without prejudice to, or spoiling, the whole, giving preference to the sons, and male heirs of the next of kin in equal degree.

§ 6. Sect. 11 empowers the judge of probate, in making out his warrant, to divide an intestate estate among the heirs, or for assigning the widow's dower, where such estate, or any part of it, lies in common with other real estate of any other person, to direct the committee first to divide the intestate's estate from this other estate; the committee to give timely notice to all parties interested. This section then provides for agents or guardians for those absent, or not of a capacity to take care of their estates.

§ 7. Sect. 12 provides for the division of estates devised, on application of any devisee to the judge of probate in the county where the estate lies, for a division of it; who may order the whole of the real estate so devised, (or that part of it the partition whereof is requested,) to be divided among the devisees, according to the will, by five or three freeholders of the county, to be sworn, and to give notice &c.; but an appeal is allowed from the judge's acceptance. By the act of 1818, reversions &c. on estates in dower, may be divided.

§ 8. Sect. 13 provides for a division of the estate devised, from the estates of others, with which it may lie in common, as in the case of intestate estates in sect. 11. But no par-

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 Art. 3. appear, from the tenor of the will, to be disputable, or uncertain. Like provision for persons interested, being out of the government, or not of a capacity to take care of their estate. These provisions as to estates intestate and by devise, are consolidated by the act of 1818.

§ 9. Sect 14 provides, that the judge may issue his warrant of distress against any party interested in such partition, to compel him to pay his proportion of the expense; provided an account of it be first laid before the judge, and the proportion of the delinquent person interested, settled and allowed, after due notice to be present at such settlement and allowance.

§ 10. Sect. 15 provides for assigning the real estate among the parties in unequal proportions, as above, as it will best accommodate &c., paying &c. such sums as the committee shall award. This clause seems to extend to estates testate and intestate. This statute was revised A. D. 1818, and some small alterations were made, besides the alterations above. 14 Mass. R. 403, *Pond v. Pond*: tenants in common agreed to a partition of their estate, and in pursuance thereof, probate proceedings were had; though not competent to effect partition, yet, however, deemed a license from each of them, that each might occupy the part assigned to him by such intended partition, so as to protect him from the penalties of the statute of 1785, c. 62, till legal process commenced for partition. This a revocation of the license.

Mass. Act.  
 March 11,  
 1784, c. 41,  
 Court par-  
 titions on  
 petition,  
 15 Mass. R.  
 155. Maine  
 Act, ch. 37.

§ 11. Sect. 1 provides, "that any person or persons, interested with others in any lot or tract of land, or other real estate, making application, (either by themselves or their agents, attornies, or guardians,) to the Supreme Judicial Court of this Commonwealth, or Court of Common Pleas, of the county in which such land or other real estate lies; the said courts are severally authorized and empowered to cause partition to be made of such lands or other real estate; and the share or shares of the party or parties applying for the same, to be set off and divided from the rest." This partition to be made by five or three freeholders, under oath, to be appointed by the court. Their return being made, and accepted by the court, and recorded in it, also "in the registry of deeds in the county where such estate lies, shall be valid and effectual to all intents and purposes."

§ 12. Sect. 2 provides for executions to issue against such applicants for the partition, as refuse to pay their part of the expense attending the division ascertained, settled, and allowed by the court, after due notice &c. "And when any mesuage, tract of land, or other real estate, shall be of greater

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value than either party's purpart or share in the estate to be divided, and cannot at the same time be subdivided, and part thereof assigned to one, and part to another, without great inconvenience, the same may be settled and assigned to one of the parties, such party paying &c., as the committee appointed to make partition, shall award."

§ 13. Sect. 3 makes provision for due notice to all persons interested, by a service of a copy of the petition on them, or on the attornies of those absent, or the substance of the petition must be published three weeks successively, in one or more of the public newspapers ;—also for persons not capable of taking care of their estates, by guardians appointed to such according to law, if they live within the State ;—also for the appointment of agents for persons interested, out of the State for the space of one year and not returned, and having no sufficient attorney in the State ;—also for due notice to be given by the committee to all concerned, known, and within the State ; but no partition to be made where one concerned is beyond sea, and shall not have been absent twelve months, and is expected to return in six months ;—also makes provision for any one concerned in the partition, and out of the State at the time, and not notified, to apply to the court any time within three years, and to have partition made anew, regarding the value of the estate when partition was first made, and making due allowances for improvements made, after such partition, on any part taken from one, and assigned to another, in such new partition ; and the court may issue execution for such satisfaction awarded, and costs adjudged by the court.

§ 14. There was nothing compulsive in this act, as it contained no mode for trying an issue ; and therefore the act, next mentioned, was passed to remedy this defect.

§ 15. This additional act enacted, "that when the facts alleged in any petition for partition, hereafter to be preferred, in consequence of said (first) act, are controverted by any of the tenants in common, the answer or objection to the petition shall be made in writing in the form of a plea, to which the petitioner may reply or demur, to the end the matter in dispute may be reduced to an issue in law or fact, and receive a determination by the court or a jury, in the manner other issues are determined ; and in case the issue be determined in favour of the petitioner, judgment shall be entered up by the court, that partition be made, by disinterested freeholders, as the law directs ; and proceed to appoint them accordingly ;" and allow him his costs of the trial ; but if found he holds a less proportion in common and undivided than he has in his petition alleged, he pays the adverse party his reasonable costs, though the petitioner has judgment for the part he proves &c.

Mass. act,  
Feb. 14,  
1787.—  
Maine act,  
ch. 37.

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§ 16. Section 2 provides, that either party may appeal from the Common Pleas to the Supreme Judicial Court. That partition shall be made before the appointment of the freeholders ; but if not till after their return, the first judgment stands. Makes the usual provision if the party appealing fails to prosecute. The above issue must be tried in the county where the land lies, unless the parties agree otherwise.

14 Mass. R.  
431.—See  
Ch. 191, a. 4,  
s. 11.

§ 17. Section 3 extends these provisions as to appeals to all actions of partition. A probate partition, though void as to one heir not notified, may be valid as to another properly notified, and who accepts the partition and payment of monies awarded to him or her ; the proportions remaining the same. See a. 4, s. 11.

ART. 4. *Decisions on these statutes.*

April term,  
1808, Essex.

§ 1. See the cases above stated or referred to. Held by the chief justice that a writ of review does not lie upon a petition for partition.

Mass. S. J.  
Court, York  
June term,  
1799,  
Kingston &  
ux. &c. for  
partition.

§ 2. The plts. petitioned for partition, and stated they were seized &c. of certain undivided proportions (more than their true proportions) in common and undivided with the heirs of Benjamin Stacy, and others unknown. Plea, that Ichabod Stacy was sole seized, and issue. Held, he should have pleaded he was sole seized and traversed the seizin in common. The petitioners had leave to amend ; and they amended, and declared for their true proportions, after tracing their titles and accurately calculating their proportions

Cook v.  
Allen.

§ 3. Though this case has been before (Ch. 104) stated somewhat at large, yet of so much importance are the points decided in it, in partition, it may here be useful to state those points in a few words. In this case the court held 1st, that partition regularly made, binds the right of possession : 2. That one after having such partition, may be evicted by a writ of right : so the mere right of property is not bound by partition ; but it is not known that any such writ of right has ever been brought after a regular partition made.

2 Mass. R.  
479, Thomas  
v. Smith &  
al.—Party  
dying before  
the interlo-  
cutory judg-  
ment abates  
the writ, 10  
Mass. R. 9,  
by common  
law.

§ 4. On a petition for partition, held, that on the death of one of two respondents named in the petition, his heirs cannot be admitted to defend, but the petition must abate. Smith and the heirs of Staples pleaded, and the petitioner replied ; and the respondents demurred to his replication. The court, of its own motion, held as above. "No statute authorizes heirs to prosecute or defend in a writ, or on petition for partition, the suit commenced by or against their ancestor." "In a real action against the tenants as joint disseizors, on the death of one of the tenants, the demandant may prosecute against the survivor ; for the same seizin and disseizin are in issue between the parties on record." One deft. died before partition was awarded.

§ 5. Vaughan and others petitioned for partition of a very extensive territory, called Brown's right, and described as a tract of land eight miles wide and twenty-five miles long. Held, the court must prescribe such public notice as will inform all the inhabitants, of the pendency of the petition; so ordered the petition and order thereon, to be published three weeks successively &c., in a Boston and Portland newspaper, (land lay in Lincoln county;) also to post copies of the petition and order, "at each of the places of public worship on the territory," described in said petition; "and at each place in each of the towns and plantations in said territory, where the inhabitants thereof have usually assembled to transact their town and plantation affairs."

CH. 191.  
Art. 4.

6 Mass. R.  
252, Vaughan  
& al. v. Noble  
& al.

§ 6. This was a petition for partition against a land corporation, for a share that had been sold more than forty years since, for the non-payment of an assessment voted by the proprietors, and the purchasers under the sale had been ever since in possession. The court observed, that this process lies only for "persons actually seized." Petitioners nonsuited. But see *Wells v. Prince*, a. 1: but supported by our practice.

7 Mass. R.  
475, Bonner  
& al. v. Ken-  
nebec Pro-  
priators—But  
also 15  
Mass. R. 156.

§ 7. Held, a petition for partition does not lie, where the petitioners state they hold the whole of the land, whereof partition is prayed. Costs may be given on a petition for partition where an issue in law only is joined. Was not the demurrer below on which the issue was joined, *pro forma*, merely to bring up the cause. The statute makes no distinction as to issue in fact or law.

7 Mass. R.  
503, Swett &  
al. v. Bussey  
& al.

§ 8. This was a petition for partition by Rice, as the first Protestant minister settled in the town of Brownfield, stated he was seized of one-sixty-fourth of the lands in it, "in the right of the said town, and for the use of the ministry;" "also another one-sixty-fourth part of all said lands in fee simple, as such first settled minister." Held, he could not support his petition. When the legislature granted this township, it took security from the grantee that he should assign these rights and proportions &c. The assignment must be enforced by the government, the grantor, taking advantage of the breach of the conditions of the grant by the grantee.

9 Mass. R.  
38, Rice v.  
Osgood & al.

§ 9. Petition for partition of lands in Nantucket against certain persons named in the petition, and others to the petitioners unknown. The court refused to hear a motion to dismiss the petition, on the ground that some of the persons interested in the lands, not named in the petition, had died since filing the petition; and put the respondents to plead the fact in abatement; and held, when the fact was pleaded, it was not sufficient to abate the petition; also held it is essential to an estate held in common, to be subject to partition;

10 Mass. R. 6,  
Mitchel & al.  
v. Starbuck  
& al.

CH. 191. also that the common and undivided lands in the island of  
 Art. 5. Nantucket are liable to partition upon petition. One who  
 died was no party to the record.

§ 10. As to probate partition; see *Gordon & al. v. Pearson*, Ch. 92, a. 2. Where no need of a judgment that partition be made; *Symonds v. Kimball*, Ch. 137, a. 13, s. 15. Petitioners' purparty only need be assigned; *Id.* Enough, return by committee be, they were duly sworn; *Id.* No costs but on issue joined; *Id.* Land lying on both sides of a river divided; *King v. King*, Ch. 68, a. 5.

Settling the whole on the oldest son &c., paying &c. does not extend to the reversion of the widow's dower; *Hunt v. Hapgood & al.* Ch. 126, a. 2; see the late act of 1818.

11 Mass. R.  
 507, *Smith v.*  
*Rice*.—See  
 a. 3, s. 17.—  
 Other probate  
 partitions. stat.  
 1819.—Stat.  
 1820, c.  
 64.—16  
 Mass. R. 201,  
 167, 122,  
 129, 524.

§ 11. *Probate partition void.* The estate being assigned to a female where it should have been to a male heir &c. This was a probate division of the estate of one Israel Smith, who died seized in 1802, leaving no issue, but four brothers and sisters, demandant one of them; he claimed an undivided fourth. In the division, the whole was assigned to a female heir; there being a male heir then abroad, and no notice to him, and no agent to act for him. Held, void as to him; and he recovered his fourth undivided part, though said female heir had paid the sum awarded to such male heir, in a suit in which she was summoned as his trustee. The plt. was not confined to an appeal, as he had no opportunity to appeal; and as to him the judge had no jurisdiction, as he was not a party before him, for want of notice. He could avoid by pleading, as no writ of error lies in probate cases.

13 Mass. R.  
 211.

§ 12. The Common Pleas accepted the return of commissioners making partition. Supreme Judicial Court will not suspend an appeal.

#### ART. 5. *Partition in other States.*

§ 1. As the English laws in regard to partition, were, early in the settlement of this country, found to be very deficient, as in them there was only the writ of partition provided for, in which partition was made amongst all the tenants, as well plrs. as defts.; this partition among all the shares, in a single suit, was soon found to be inadequate for the cases of many of our tenancies in common, of great tracts of land held by hundreds of owners; and in which suit by writ, the death of any one of the parties abated the writ. From very early times we have had many estates held in common of so large tracts of land, and by such numerous owners, that it must have often been utterly impracticable to have commenced and carried a writ of partition through all its stages, without the death of some one of the parties happening, pending the suit; and totally impracticable in a single action to have divided a great tract of land

into hundreds or thousands of parts or shares. Some mode then evidently became necessary to enable some one or more of these owners to have his or their shares set off from the rest, without making as many divisions as owners. This method, our ancestors, in most of the English Colonies in America, early adopted, proper to answer this purpose ; and accordingly early provided for the making of partial partitions by process in courts, that is, a process calculated to divide and set off some one or more shares from the rest. This was naturally done by allowing those who wished for such partial division to petition some competent court, to have the same done accordingly. Though the circumstances of the country dictated these partial divisions of great tracts of land, as a general principle in all the Colonies on the continent, yet different measures, in detail, were and ever have been adopted in the different Colonies and States, to carry it into effect. In Massachusetts we have just seen the process, to which it may be proper here to add a few cases of partition in some of the other large States. As

§ 2. *New York. On statutes of April 7, 1801, April 9, 1804.*

This was a partition made by deed ; and it was decided it operated as an estoppel as to the parties, and all claiming under them. Hence, where a partition was made in 1747, and possession taken by the parties according to the survey and map then made, it was adjudged conclusive, though by a second survey in 1801, it was found there was a mistake in the first survey, on which the partition was made. *Secus*, had the proprietors afterwards agreed to correct the mistake, and alter the boundary lines.

3 Johns. R.  
Jackson v.  
Hasbrouck,  
331, 335.

§ 3. This was petition for partition on the statute in New York. A died seized of lands, and the heirs proceeded to obtain partition of them by petition ; and A's widow, entitled to dower, not appearing, was defaulted, and judgment against her ; and in the judgment of partition entered thereon, reasonable dower was assigned and adjudged to her out of her husband's lands ; and she was adjudged to pay \$80,96 for her part of the expense of partition ; and the heirs afterwards issued a *fieri facias*, and sold her said dower at auction to pay said \$80,96. Held, the proceedings were null and void as to her dower ; that she was not a tenant ; nor did her rights come within the purview of the statute, for making partition of lands ; and that she was not bound to appear ; nor could her rights be affected by the judgment. If the deft. do not appear, the court on motion order partition as prayed. 1 Caines' R. 121.

5 Johns. R.  
Bradshaw v.  
Callaghan,  
80, 83.—See  
s. 11.  
An allegation  
of seizin is  
intended in  
fee. 2 Cain.  
R. 385.

CH. 191.  
Art. 5.

CH. 191.

Art. 5.

8 Johns. R.  
558, 566,  
Bradshaw v.  
Callaghan &  
wife; a ten-  
ant in dower  
is no party  
by the statute  
as to partition  
or costs.

10 Johns. R.  
486.

3 Johns. R.  
459, Antell &  
wife v.  
Brown.

1 Dallas, 352,  
to 354, Wal-  
ton v. Willis,  
appeal from  
the Orphans'  
Court.

2 Dallas, 267,  
Walker v.  
Dilworth  
& al.

§ 4. On a petition for a partition under the statute; held, it was not necessary to state the rights and titles of the tenants at large; nor is it necessary to allege the seizin of the ancestor, or person from whom the parties derive title; but it is sufficient to state, in general terms, that each tenant was seized of his part or share in fee, or, as the case may be, whether such seizin be acquired by descent or purchase; so a tenant in common of the inheritance may maintain partition, though a particular estate is outstanding; and where a partition was made among several heirs, assigning to each his portion of lands by metes and bounds, but excepting from each portion one third thereof, as the dower of the widow of the ancestor, the partition was adjudged good, and though her dower is excepted, and left undivided. If an infant be interested, there must be a guardian *ad litem*, though he have testamentary guardians.

§ 5. Several tenants in common; one had sold his share, yet the plt. in partition proceeded as if no such alienation had been made, by notifying the original cotenant, without taking notice of the grantee. The judgment in partition was held void; parol partition and possession under it is valid. 4 Johns. R. 202, 213.

§ 6. *Pennsylvania*. 1. If, in partition of an intestate estate, a tenant by the *curtesy* has a share, and no provision is made for him as such, of his wife's share, the partition is void. 2. It is best, though not absolutely essential, for the party petitioning for partition of the real estate of the intestate, to be particular in naming the persons entitled to shares, and the purparty of each, and in this respect to pursue the form of a declaration in partition, and of the return of a writ *de partitione facienda*: 3. On the acts of assembly, the eldest son of the eldest son of the intestate is to have assigned him, in partition, an estate that cannot be divided at the valuation. 4. The sentence of the Orphans' Court, in such case, must specify the purparts of the valuation money to be paid, and fix the time of payment; but if not so done, 5. The Supreme Court, on appeal, may fix these points, and then the debt. must pay all the costs of appeal. 6. If an heir at law offer to take an intestate's real estate at a valuation, the fee is not in him if he has not paid the valuation, or secured payment of it to those entitled to it. The statutes of Pennsylvania on this subject are not materially different from those of Massachusetts. 7. Though the practice is to make partition of the real estate among the parties entitled, yet if that cannot be done without prejudice to the whole, then to make the valuation.

§ 8. *Quære*—If tenant by the curtesy is entitled to partition by writ against tenants in common, seized of estates for life or in fee, or if he can have any writ of partition.

§ 9. A recovery in partition is no bar to an action of dower in that moiety of the premises assigned to the tenant. 1 Dallas, 415, 419. CH. 191.  
Art. 6.

§ 10. On the plea of *non tenet insimul* &c. evidence may be given, that some of the defts. were not tenants of the freehold, but only tenants at will. 1 Dallas, 2,  
Bethel v.  
Lloyd & al.

§ 11. Possession in partition forty years on a plan &c. cannot be disturbed; as where the proprietors of a patent made a map and survey and partition, and took possession accordingly, and so held forty years; adjudged they were concluded from contesting with each other, the correctness of the actual locations. 3 Johns, R.  
8, 12, Jack-  
son v. Ved-  
der.

§ 12. If two joint tenants, of full age and sound mind, fairly make partition of a tract of land by deed, and by an old survey, both equally ignorant of its accuracy, such partition is binding, however unequal it may be upon them and their assigns, and if made by attorney, it is not material whether he sign A. B., attorney for C. D., or C. D. by A. B. his attorney, Jones' devi-  
sees, v. Car-  
ter, 4 Hen. &  
M. 184, 200.

ART. 6. *Pleadings in partition.*

§ 1. These are not involved in any intricacies. It has been already observed, that most *writs* of partition in England were founded on the acts of H. VIII.; before these acts, joint tenants, and tenants in common, were not compellable to make partition; on these acts, partition by writ, and pleadings thereon, are mainly founded.

§ 2. This statute enacts, that all joint tenants, and tenants in common, of any "estates of *inheritance* in their own rights, or the rights of their wives," of any "lands, tenements, or hereditaments," may be compelled, by virtue of this act, to make partition between them, of all such lands &c. as they hold as joint tenants, or tenants in common, by writ *de partitione facienda*, to be devised in chancery "in like manner and form as *coparceners* by the common law of this realm, have been, and are, compelled to do, and the same writ to be pursued at common law; provided that every of said joint tenants, and tenants in common, and their heirs, after such partition made, shall, and may have aid of the other, or of their heirs, to the intent to deraign the warranty paramount, and to recover for the rate, as is used between *coparceners* after partition, by order of the common law." 31 H. VIII. c.  
1.

§ 3. This statute gives the like remedy to joint tenants, and tenants in common, *for life or years*, to make partition by writ; also joint tenants, or tenants in common, when some of them have estates *for life or years*, with the others that have estates of *inheritance* or *freehold*, in any lands, tenements, or hereditaments. 32 H. VIII. c.  
32.

CH. 191.

Art. 6.

3 Bac. Abr.  
211.—Co. L.  
175 a.

§ 4. By force of these acts, the *alienee of a coparcener*, may have this writ against the other *parcener*, because they are tenants in common; so tenant by the *curtesy*, has this writ on the 32 H. VIII., for though not joint tenant, or tenant in common, yet his case is within the equity of the statute; but two *coparceners*, and the alienee of a third, cannot have this writ; not at common law, for by it this writ lies; not for the alienee, nor by the statute, for that this writ lies not for *coparceners*; such cases then are only within our statutes for making partition by petition. These acts were adopted in our Colonies south of Virginia, by statute, in 1712.

3 Bac. Abr.  
212.

§ 5. When the writ must be special, or may be general; see above, article 1 and 2; how two judgments and a jury is had, see post, and above, *Tyng v. Tyng*, and *Commonwealth v. Boston*. It is the office of the jury to make equal and fair partition, and to allot to each party their full and just share, under the seals of the sheriff and of the jurors. No writ of error lies on the first judgment.

§ 6. *Writ of partition*, for the form, see above; also American Precedents, 313, 314; by joint tenants; by *parceners*; by tenants in common; same by *baron and feme*.

§ 7. *Petition for partition*. Forms, see American Precedents, 315. This petition is to the court &c.; in it, the petitioners show and represent, describing themselves, "that they are seized in fee simple, and possessed of, and in" one undivided —, part of a tract of land, with the appurtenances, situated in —, containing —, bounded —, or whatever their proportion, or the estate to be divided, may be; and if the petitioners wish for partition also *among themselves*, they further state each one's proportion; after describing themselves, their proportions, and the premises to be divided according to the material facts in the case, the petitioners conclude, "wherefore they pray the aid of this court; and that by a due course of proceedings, they may have assigned and confirmed to them and their heirs respectively, their shares and rights aforesaid, to hold and occupy in severalty," and as in duty bound &c. This petition may be signed by the petitioners themselves; or they may sign it by their attorney, agents, or guardians.

If one of the petitioners be a tenant by the *curtesy*, or husband and wife, in her right, sue &c., or any special interest exists, it ought to be stated; for as the judgment in partition assigns and confirms to the petitioners their respective rights and estates, it ought always to appear in their petition, what their rights and estates are, that are so assigned and confirmed.

§ 8. *Plea*. See *Commonwealth v. Inhabitants of Boston*, above, article 2; so *Kenniston and wife & al.* article 4; *Cook v. Allen*, Ch. 104, a. 3, &c.

If the petitioners claim a larger proportion than they are entitled to, the respondent's plea is, "and now the said D. comes and defends the force and injury &c., when &c., and says, that the said petitioners hold less shares or proportions in common and undivided in the said tract of land, than they have in their petition alleged, and thereof puts himself on the country." The petitioners claimed to hold  $\frac{7}{8}$  each; the jury found  $\frac{4}{8}$  each, and costs adjudged to the respondent.

CH. 191.  
Art. 6.

§ 9. So the respondent or deft. may plead he is *sole seized*, "without this, that the petitioner was, and is, seized of any part thereof, as tenant in common;" and prays judgment, if the petitioner ought to have and maintain his petition &c.

§ 10. So two defts. pleaded their several seizins of the whole, in bar of the petition. *Hunt v. Hapgood*, Ch. 126, a. 2.

§ 11. See several good pleas &c. in Partition, Story's Pleadings, pages 347, 348.

§ 12. The form of pleadings is, that the party, either plt., petitioner, or deft., or tenant, *is seized*, or *is not seized*, (as the case may be) or is seized, or is seized of less than he claims as above; therefore "if one *parcener* disseizes the other till re-entry, or recovery by the disseizee, the other does not hold in *parcenary*."

Co. L. 167.—  
5 Com. D.  
Partition,  
Ch. 1.

§ 13. *Judgment*. 1st *Judgment* in partition: "It is considered by the court here, that the partition be made, and ordered that A, B, and C, disinterested freeholders in said county, be appointed to make partition &c.

§ 14. 2d *Judgment* is: "It is considered by the court here, that partition be established." Error lies not on the first judgment; but if it be in the Common Pleas, an appeal lies as above.

§ 15. Petition for partition, in which the petitioners state, they are seized as tenants in common, to wit, so state their proportions, and one a *non compos mentis*, under the guardianship of —, and pray &c.; the respondents severally pleaded, they were sole seized of certain parts of said estate, describing them; petitioners replied, they were seized in common, as aforesaid, and traversed the sole seizin of the respondents, and issue joined. Judgment was against the respondents, who relied on a probate partition, made *after* some of the heirs had sold their shares to others, in which case the probate power to make partition among heirs or devisees, was at an end, as the judge of probate cannot take notice of any conveyances among them, or of any of them, to strangers; he has no means to decide on their validity, and some shares were assigned to purchasers.

13 Mass. R.  
413, Pond &  
al v Pond &  
al.—See Ch.  
191, a. 3, s.  
10.

§ 16. After a long possession by one, a tenancy in common might have been presumed; yet if he offer a will, showing the

9 Johns. R.  
270, 277,  
*Jackson v.*  
*Vasburgh*.

CH. 192.

Art. 1.



contrary, and waive it, there remains no room for the presumption of any other source of title; as where A died seized of lands, leaving B, C, and D, his sons; B's heirs brought ejectment against E, claiming to hold under D; E offered A's will, dated in 1757, devising his real estate to said three sons, in fee, and equally; on an objection of insanity, this will was waived, and E relied on a parol partition, made in 1786, among said sons, who previously held as tenants in common, severally, and so continued ever after. Held, when the title is admitted to have been in common, a parol partition following by possession under it, will be valid; but where the whole right and title of the party setting up the tenancy in common, and also parol partition, are denied, such partition and possession under it, will not be admitted to transfer the title; that by waiving A's will, the title was to be viewed in B, his heir at law, and could not be divested by parol. The Supreme Judicial Court in Massachusetts, has also decided, that if a party show a defective title as the ground of his right, a presumption in his favor is precluded, he otherwise might set up.

*Notes.—Forms:* English; 10 Wentw. 151 to 156, referring also to other English forms: American; Story's Pleadings. 347, 348; American Precedents, 313, 315.

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## CHAPTER CXCI.

### TRUSTEE ACTIONS.

#### ART. 1. *General principles.*

§ 1. The object of this trustee suit, is to transfer a debt due one to his creditor; as if A owes a debt to B, and B owes a debt to C, this process enables C to oblige A to pay his debt to C instead of B. It is a liberal provision for creditors, as it enables them to avail themselves of *choses in action*, and debts due to their debtors, as well as of their visible property. It probably has grown out of the foreign attachment in London.

§ 2. The following cases disclose some of the leading principles of foreign attachments in London. Adopted with various alterations in most of the United States.

3 Wils. 296,  
Fisher admx.  
v. Lane.

§ 3. Mrs. Fisher, administratrix of the goods and estate of John Fisher, brought *assumpsit* against Lane and others for

goods sold and delivered to them by the said John Fisher, the plt's. intestate. Plea, never promised. Verdict for the plt. by consent; and a motion was made for a new trial. The defts. gave in evidence the payment of the debt they owed to the plt's. intestate, to one Anson. Said administratrix made four defaults in the City Court. No notice was given to her by the defts. of the foreign attachment, brought by Anson. After this case was argued at large, judgment was given for the plt. Mrs. Fisher. The defts. the garnishees in the foreign attachment, were defaulted. Three points were settled in the foreign attachment suit: 1. That a debt due to one as administrator, as this debt from Lane & al. was to Mrs. Fisher, administratrix, might be attached by Anson, for a debt due to him from her intestate: 2. That the foreign attachment process might be given in evidence on *non assumpsit*: 3. That Mrs. Fisher, the principal, ought to have had notice of the foreign attachment against her debtors in *auter droit*, Lane & al., that she might have had an opportunity to become a party to, and to defend, and to have had that notice from Lane & al. on the ground of common justice.

CH. 192.

Art. 1.

A foreign attachment is no bar to an action until judgment be rendered in the attachment. Where a bar, it may be given in evidence on *non assumpsit* pleaded. 5 Taun. R. 558, Nathans v. Giles.

§ 4. After the plt. has commenced his action in the courts above, and the deft. has appeared, the debt cannot be attached in the deft's. hands. 1 Esp. 263; Cro. El. 157; Salk. 291; Cro. El. 593. In Pennsylvania, see Ch. 187, a. 3, s. 4.

Babington v. Babington — Luckner v. Handey.

§ 5. Held, a debt cannot be attached by foreign attachment before it is due, though the judgment in the foreign attachment be not until after it becomes due; "and therefore, if the deft. were to plead the attachment, the plt. might reply, it was made before the money became due;" and on error in this same case, it was held by the whole court that the debt could not be attached before it became due.

Cro. El. 184. Dalton v. Sally.—Cro. El. 713.

§ 6. So a debt due upon record, by recovery or otherwise, cannot be attached by the custom of London. 1 Esp. 264; 3 Salk. 49.

Cro. El. 63, Sir John Parrot's case.

§ 7. The garnishee (or in our language, the trustee) may give in evidence the judgment against him on the foreign attachment.

3 East, 367, Mc Daniel v. Hughes.

No foreign attachment lies against a sovereign State, as Virginia &c.: so it is a general principle that no corporation can be trustee. 2 Mass. R. 37. So a judgment debtor is not trustee so long as he is liable to the execution of his judgment creditor; nor is the officer holding the execution in force not executed, when summoned as trustee, though he levy it after,

1 Dallas, 77. —Ch. 146, a. 7, several cases.

Ch. 192.  
Art. 2.



and before he is examined ; nor is any one trustee unless so situated as to be able to retain the property against his principal, he answers for, to his creditor : so no evidence collateral to the trustee's answer is to be admitted : so if the officer has levied the money on execution, and holds it when summoned as trustee, he is not one, until it has been demanded of him by the creditor in the execution. If the judgment debtor disclose the debt in his answer as trustee, he will be adjudged one, though liable to his judgment creditor's execution ; but otherwise if he denies he is trustee ; for then he must be discharged.

§ 8. The old, the sound, and established principle is, that one shall never be adjudged to be trustee if by any reasonable possibility he may be held to pay the money to his principal, or any other person than the plt. The trustee is an innocent man who has contracted to pay his debt to a certain person, and who without any fault or agency of his, is by this trustee process, called upon to pay this debt to another, a stranger to the contract ; and to take the hazard of being obliged to pay it also to his own creditor, to whom he contracted to pay it, which hazard is always considerable, as this creditor holds the clear evidence and contract against him. The decision, therefore, in this case may be questioned. In which the court said, we will adjudge one trustee who has accepted the principal's order, if he thinks it is negotiable ; for to be discharged he must state it is so. This was presuming against the trustee, and presuming the order was not negotiable, though the trustee thought it was, though not certain it was so ; and obliging him absolutely to state facts to prove he was not trustee.

4 Mass. R.  
206, 288,  
Sebor v.  
Armstrong &  
Winthrop,  
trustee.

2 Mass. R.  
503, Webster  
v. Gales &  
trustees.

§ 9. It is laid down as a general rule, the trustee will be holden, unless sufficient matter appear in his answer to discharge him. This seems to have been the opinion of the chief justice, Parsons ; but the state of the case did not require the opinion of the court as to this general rule.

§ 10. A lessee, when trustee, is liable for no more rent than is due by his covenant to the lessor when the lessee is summoned. See Ch. 14, a. 3, s. 14, *Wood v Partridge*.

13 Mass. R.  
104, Board-  
man v. Roe  
& Vose, trustee.

§ 11. *Trustee not bound to answer as to usury.* As where the trustee (as said) lent monies to the deft. usuriously, and took a conveyance from him of certain real estate. Held, the trustee was not held to answer a question put to him by the plt., if usury did not make part of the consideration

ART. 2. *Massachusetts statutes.*

C. & P. Laws,  
614, 617.

§ 1. In 1758 the legislature passed an act to enable creditors to receive their just debts out of the effects of their absent or absconding debtors. They then made provision in

detail for the purpose. These need not be stated as they were all revised, and mostly re-enacted in the act next to be cited. CH. 192.  
Art. 2.

§ 2. Section 1 provides, "that any person or persons, body politic or corporate, entitled to any personal action, excepting *detinue*, *replevin*, actions on the case for slanderous words, or malicious prosecutions, or actions of trespass for assault and battery, against any person or persons other than bodies politic or corporate, having any goods, effects, or credits so entrusted or deposited in the hands of others, that the same cannot be attached by the ordinary process of law, may cause not only the goods and estate of the person against whom such action lies, to be attached in his own hands and possession, but also all his goods, effects, and credits so entrusted or deposited, to be attached in whose hands or possession soever they may be found, by an original writ" &c., the form of which the statute prescribes; also the manner of serving it on the deft. the real debtor, to the plt. and on the trustees; (see Service of Writs;) and the writ must be sued in the county in which all or some of the trustees live; and by the act the deft's. and principal's goods, effects, and credits, in the hands of his trustee, are bound from the service of the writ upon him.

§ 3. Section 2 provides, for continuing the action as in other cases when the deft. is out of the State.

§ 4. Section 3 provides, that if the trustee appear the first term, and submit to an examination upon oath, and declares when the writ was served on him he had no such goods &c. in his hands, he shall have his costs &c.

§ 5. Section 4 provides for costs in several events.

§ 6. Section 5 provides, that "when the plt. shall recover judgment against the principal; and there shall be one or more trustees summoned, who shall not have come into court and discharged themselves upon oath of being trustees, as supposed in the writ; and against whom the suit shall not be discontinued; the court shall award execution against the goods, effects, and credits of the principal, in the hands and possession of every such trustee, as well as against the body, goods, and estate of the principal," in the form this section prescribes.

§ 7. Section 6 provides, that if execution be returned not satisfied, the plt. may sue out a *scire facias* against the trustees named in the execution, or against one or more of them, jointly or severally, to shew cause, if any they have, "why judgment for the sum remaining unsatisfied, should not be rendered against them; and directs the manner of proceeding.

§ 8. Section 7 provides, that if a trustee do not appear on the *scire facias*, and not having been examined, he shall be deemed to have in his hands, goods &c. of his principal's to

Mass. act,  
Feb. 28, 1796  
c. 65.—  
Maine act,  
ch. 61.

CH. 192.  
Art. 2.



the said amount returned not satisfied, and judgment accordingly; and if several defts. in the *scire facias*, the court may enter up several judgments, and issue executions in "common form against their goods, and estate; and for want thereof against the bodies of such person or persons, against whom such judgment shall be so rendered."

§ 9. Sect. 8 provides, that the trustee be completely discharged from his principal's demands on account of the goods, effects, and credits, so taken out of the hands of the trustee; and if sued by his principal, "may plead the general issue, and give this act in evidence." The principal may review as in other cases.

§ 10. Sect. 9 makes the trustee liable in case of perjury for the debt &c. Sect. 10 permits him to deliver specific articles on the execution, when bound to deliver such to the principal at a day *after* the service of the original process on the trustee. The value of them, so delivered, to be ascertained, as between the principal and trustee, by the appraisal of three disinterested and discreet men, to be chosen &c. The officer sells the articles as other personal estate is sold on execution; and the overplus is paid to the principal &c.; and if part of such articles are so taken in execution, the trustee is empowered, by this act, to deliver the residue to the principal, or make tender thereof within thirty days &c.

This act is thus largely cited because a revising act, drawn by the late C. J. Parsons, and no doubt the most perfect of the kind in the Union.

§ 11. Sect. 11 provides, that executors or administrators may answer in case of the death of any trustee, pending the suit.

§ 12. Sect. 12 provides, that no person shall be adjudged trustee on account of any negotiable contract he may have given, endorsed, negotiated, or accepted.

§ 13. Sect. 13 repeals former acts on the subject. Sect. 14 declares this act shall not be construed to repeal an act to prevent fraud and perjury &c.

Mass. act,  
June 16,  
1798, of  
Feb. 20,  
1818.

§ 14. Sect. 1 of this additional act provides, that in all processes on the above act, "wherein all the supposed trustees shall be discharged;" or the plt. discontinues his suit against all of them; or where there is no trustee, the action shall not proceed against the principal, unless there has been such a service of the writ upon him, as would be good in a case in which no trustee is named; but the principal may appear and defend, if he pleases.

§ 15. Sect. 2 enacts, that the names of new trustees may be inserted in the writ, any time before it is served on the principal.

§ 16. In Vermont and Connecticut, there long have been similar laws in substance; hence the principles of the numerous decisions on this subject, made in Massachusetts, will often apply in those and some other States.

ART. 3. *Pleadings in trustee suits.*

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Art. 3.

§ 1. The material question which occurs in these suits, is, whether the person summoned and sued as trustee, is in fact trustee or not. To have a fair view of this question, in each case, it is necessary to have a correct view of the relations and situations of the several parties in a trustee action, and of the several pleas.

§ 2. *Writ and declaration.* The writ prescribed in form by the act, directs the officer to attach the goods and estate of the deft. and principal, and to summon him to appear &c. to answer to the plt. in a plea of &c., and the declaration follows, and is framed on the deft's. contract, or wrong, as in other cases in which no trustee is named, to the *ad damnum* included. The writ then recites, the deft. "has not in his own hands or possession, goods or estate to the value" of the attachment directed, which can be come at to be attached, "but has intrusted to, and deposited in the hands and possession of" (the trustee) trustee of the deft. "goods, effects, and credits, to the said value." Then the writ commands the officer to summon the trustee or trustees named in it, to appear at the court &c. "to shew cause why execution to be issued upon such judgment, as the said P. may recover against the said D. in this action (if any) should not issue against his goods, effects, or credits, in the hands and possession of him," the trustee &c.

§ 3. Thus the writ creates three parties, the plt., the deft., and thirdly, the trustee. The pleadings as between the plt. and deft., also often called the principal, are, as in all other cases, grounded on the plt's. demand in his declaration, which is as between him and the deft. alone.

§ 4. The pleadings peculiar to this trustee action are only between the plt. and trustee; and they are much circumscribed in several ways: 1. This trustee process does not extend to any real or mixed actions; nor to actions of detinue or replevin, or for slander or malicious prosecutions, or assaults and batteries, or to any cases so as to make any corporation trustee: 2. Nor to any cases in which the deft's. goods or estate can be come at to be attached.

§ 5. 3d. The trustee may be defaulted, if he pleases, and satisfy the execution, (often the case,) and then there are no trustee pleadings;—or he may admit himself to be trustee to such an amount, to the plt's. satisfaction; then there is no need of such pleadings.

§ 6. But if the trustee must plead in some several cases, his pleas are short and plain. As

§ 7. 1st. The trustee comes and defends &c. when &c., and says, that he had not, at the time of the service of this

Ch. 192. writ upon him, any goods, effects, or credits of the said (deflt.)  
 Art. 4. in his hands, and thereof submits himself to examination on  
 oath, wherefore he prays he may be discharged, and allowed  
 his costs, or only he be allowed his costs. The plt. replies,  
 by praying the trustee may be examined on oath.

§ 8. 2d. Or his plea may be more special; after denying he had any goods &c. of the deflt. in his hands, he may add, "unless upon the following state of facts, the court shall adjudge the said (trustee) at the time of the service of this writ upon him, had in his hands and possession, goods, effects, and credits of the said" (deflt.); then state the facts, as he can swear to them, and then conclude, by submitting himself to examination &c. as above.

§ 9. 3d. Upon *scire facias*, the trustee pleads, and the said ——— comes and defends &c. when &c., and says, the plt. ought not to have judgment and execution against him, the said (trustee,) of his own proper estate, for the damages and costs aforesaid, because, he says, that at the time of the service of the original writ in this case, upon him, he had not any goods, effects, or credits of the said (deflt.) in his hands &c. as in the above plea. Wherefore he prays judgment, if judgment and execution ought to be had against him of his own proper estate as aforesaid, and for his costs. The trustee may in a few cases plead in abatement.

Adams v.  
 Waite, tr.

§ 10. These are in substance the pleadings peculiar to this trustee process, out of which usually arise three questions: 1. Do the facts, stated by the trustee, in fact make him trustee or not: 2. If they do, then to what amount: 3. Question as to costs. The amount does not require much attention.

§ 11. Upon this trustee process there have been a great number of judicial decisions made by our Supreme Judicial Court, which may be classed in the following articles, to wit:

ART. 4. *Facts that make one a trustee.*

3 Mass. R.  
 564, *Picrson*  
*v. Weller*,  
*scire facias*.

§ 1. A conveyed a real estate to B in fee, owing him, say \$1000, and as security for the same; and B, after he was summoned and examined the first time, sold the estate for \$1500; held, he was trustee for the overplus. This real estate was turned into money *after* the service of the writ on the trustee, and *before* his last examination.

4 Mass. R.  
 101, *Decoster*  
*v. Livermore*.—See  
 Ch. 18, a. 3.

§ 2. This was a *scire facias* against the trustee. Edmund Bartlett jun. gave his promissory note to Cox; this Cox proved under the commission of Bartlett's bankruptcy. Held, his assignee, Livermore, was trustee to Cox, though he endorsed the note *after* so proved, to his daughter. The endorsement to the daughter was not considered as a valid one; and if it was, her father would receive the money to her use.

§ 3. A promised to perform labour for B to a certain amount. A is trustee *after* the promise is broken, and debtor to B the agreed value of the labour ; but not *before* the promise is broken ;—and so, before, is not a credit liable to attachment. 4 Mass. R. 102, *Wrigley v. Geyer and Whitney*, trustees. CH. 192. Art. 4.

§ 4. This was *scire facias*. Cross, the trustee, first disclosed on the *scire facias*, and stated that Patten and Waterman, owing Cross \$—, gave him a bill of sale of a ship, with a power to sell her for cash, if the debt was not paid in a certain time ; that he sold her after summoned for their benefit, for promissory notes, payable in sixty and ninety days ; and sold these notes at \$213 discount, leaving a balance due from him to them of \$575.97. The court, on argument, allowed him to deduct this discount, and adjudged him trustee for the \$575.97, and that sum only. It may be observed the court, in this case, took into view the sale of the property made *after* the service of the original writ on the trustee, but merely to ascertain the amount,—the amount he held when the writ was served. 4 Mass. R. 404, *Hyde v. Cross*, trustee of Patten and Waterman.

§ 5. A held promissory notes against B ; B held a less note against A, not negotiable, payable by instalments. A, who owed the non-negotiable note to B, without his assent, endorsed the sums becoming due on it from him to B, as the instalments fell due on B's notes to A, not then payable. Held, A was trustee and debtor to B to the amount of A's said non-negotiable note to B, on the principle A had no right to pay his said note to B in the way A attempted. 5 Mass. R. 214, *Greenough v. Walker & al.* and trustee.

§ 6. A and B were summoned as trustees of C, and pending the action, C recovered judgment against them. This judgment they received, gave bond &c., and pending the review, A and B settled the action with C, by paying him the amount of the first judgment, double interest and costs. Held, they were trustees. C sued A and B before the trustee suit was commenced ; but this was commenced in time for them to plead it to his action, and as they paid him in their own wrong, the court intimated they might recover the money back from him, as paid by mistake, as far as they were obliged as trustees of C, to pay Locke. 7 Mass. R. 149, *Locke v. Tippets & al.* trustees.

§ 7. Downs, after the marriage of Noyes with his wife, living at the time of the action, gave a note, not negotiable, payable to her at a future day, which had not arrived at the time of Downs' answer. The note was given for a consideration arising wholly from her property. Held, Downs was the trustee of the husband, as this note, payable to her, was legally payable to him. As no notice was taken, in the judgment given, the note was payable at a *future* day, it is pro- 8 Mass. R. 229, *Shuttleworth v. Noyes*, and Downs, his trustees.

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Art. 4.



8 Mass. R.  
486. Parker  
& al. v. Kins-  
man and  
trustee.

bable, though not so stated, it became due before this decision was made. Also said by Sedgwick J. if Noyes had died, this note would have gone to his executor &c., and not to the wife. *Quere.* See Ch. 19.

§ 8. Israel Kinsman, the deft., May 20, 1811, by indenture, assigned all his property to Jacob Peabody, his trustee, in trust for Kinsman's creditors, who should, in twenty days, make their claims, and ratify the assignment. Peabody took possession of the goods, but no invoice of them was made. May 22, 1811, and before any of the goods were removed from Kinsman's store, his creditors broke it open, and attached the goods. Afterwards Peabody was summoned in this action, and when he answered, the officer held the goods. Held, Peabody was trustee, and had his remedy against the officer.

Also where one is trustee; see *Jones v. Gorham & al.* Ch. 18, a. 3; as to seamen's wages being attachable &c., see *Wentworth v. Whittemore* and trustee, Ch. 57, a. 1; *Coburn v. Ansart & Locke*, trustee, Ch. 9, a. 17; what kind of note makes a trustee, *Clark v. King & trustee*, Ch. 20, a. 3.

14 Mass. R.  
271.

B may be trustee to A, on account of hides he deposited in B's hands, though in the process of tanning, by a provision in the statute.

5 Mass. R.  
199. Davis v.  
Marston &  
trustee.

§ 9. A, building a vessel, agreed B, C, and D, should have  $\frac{2}{18}$  of her, and pay their proportions of the bills; B paid his  $\frac{1}{18}$ ; but C and D did not; A did not make or tender a bill of sale to B, but employed her on his own account. Held, A was trustee to B for the amount of the supplies he furnished; as B acquired no interest in the vessel, but A continued to own the whole of her, B's supplies were for A's vessel, and his use; and as A treated the whole of the vessel as his own, he could not say B's supplies ought to viewed as furnished for his  $\frac{1}{18}$  part of her.

11 Mass. R.  
72. Lewis v.  
Hancock &  
Winslow.

§ 10. *Scire facias* against the defts. as trustees to one Benson, master of the sloop Juno, from Charleston to Boston, in 1810; the defts. received certain merchandise (consigned to them) from him, brought in said sloop, the freight of which was \$—; this they paid to the owner, being claimed by him, by Gay & Wheeler, his agents, before the commencement of this suit; they agreeing to pay it back, if decided they were not entitled to it. Benson, the master, did not claim it as due to him as owner; and the trustees, the defts., also stated, they believed Thompson, the owner of the Juno, never meant the freight money should be paid to Benson. Held, the consignees, G. & W. were trustees of Benson, the master, to the amount of the freight. Defence was, it belonged to Thompson, the owner of the vessel, and not to the master, merely

the owner's servant, and a discharge by the principal, was good against the agents ; but held, the master is entitled by law to the freight money, and may retain the goods till it is paid him, and if he do not so secure it, and it is lost, he is accountable for it to the owners.

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§ 11. The case must be tried on the statement of the trustee, and no regard can be paid to the affidavit of any third party, stating his interest.

11 Mass. R.  
90.

§ 12. Held, if my debtor attempt to discharge himself, by showing he has paid on a trustee process &c., I may prove the debt is still due to me from him, otherwise I am placed entirely in his power, who may cancel the debt by his own declaration ; and see *Wood v. Partridge* ; *Hills v. Elliot*.

11 Mass. R.  
334, *Groves v. Brown*.

§ 13. An attorney of this court, having in his hands money collected by him in the course of his profession, is liable, as trustee of the party, for whose use it was received. B, a debtor to A, is sued by A ; pending the suit, B may be attached as his trustee ; neither party in the said pending action can have costs.

12 Mass. R.  
441.

15 Mass. R.  
185.

ART. 5. *Facts that do not make one a trustee.*

See Ch. 146,  
a. 7.

§ 1. Freeman sued Frye on covenant broken ; February, 1805, they referred all demands by a rule of court, and agreed judgment should be entered on the report, and execution accordingly. May 14, 1805, the report was made, awarding Frye to pay Freeman \$602.84½ and costs. June term, 1805, returned to the court. May 24, 1805, Howell commenced this action ; writ returnable to the same June term, and entered it, and Freeman had judgment against Frye on said report. Held, Frye was not trustee ; he must not " be twice charged for the same credit ; one by the attaching creditor, and again by his principal ; the credit, therefore, liable to this attachment, must be so situated, that, if it be taken by the attaching creditor, the trustee may legally defend himself, when called on by the principal." This was not Frye's case ; he had no day to plead this trustee attachment in bar of his principal's action.

3 Mass. R.  
121, *Howell v. Freeman*, and  
Frye, trustee.

§ 2. Ham & al., the defts., owned a ship ; and the trustees shipped monies in her to Calcutta, on shares. Held not to be trustees before the termination of the voyage ; they were summoned, March 10, 1804 ; the ship arrived in Boston, May 18, 1804 ; and goods were delivered to the trustees, who sold them before their examination. Held, all was contingent till the voyage was made up.

3 Mass. R. 33,  
*Davis v. Ham & Francis & al. trustees*.

§ 3. In this case, Smith had a cargo belonging to himself, Sheafe, and French ; left a part of it, with merchants, at Port Royal, and took their receipt as received by them *of him*, to sell, on *his* account and risk, the proceeds to be subject to his order. After he was summoned, and before his examination,

4 Mass. R.  
235, *Willard v. Sheafe, and Smith his trustees*.

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he received the proceeds. Held, Smith was not trustee when attached, September 8, 1807, for then he was not debtor to Sheafe for any part. While the property was in the merchants' hands, September 8, this was a *contingent* debt, not attachable; and the form of our process, as well as the provisions of the statute, admit of the attachment of a debt *absolutely due*, but payable in *futuro*. Smith was discharged. *Note*.—His receiving the proceeds after attached, and before examination, made no difference; nor did his taking the receipt or security in his own name, make him accountable; it was the course of business.

4 Mass. R.  
238, Kid v.  
Shepherd.

§ 4. Held, if an action be pending against a debtor, by his creditor, to recover a debt, the debtor cannot be held trustee of the creditor for such debt, if summoned *after issue joined*, though before verdict, for after issue joined, it is too late to plead the attachment in bar of the creditor's action.

4 Mass. R.  
258, Van  
Stappert &  
al. v. Pearce.

§ 5. Held, that if A's debtor make an express promise to pay the debt to A's factor, the debtor is not trustee of A; for on such promise he is bound to pay it to the factor; and thereon he can maintain an action in his own name for the use of the principal; but this express promise was, in fact, made by the principal's implied consent.

4 Mass. R.  
450, Foster v.  
Sinkler, and  
Thompson,  
his trustee.

§ 6. Held, if A give a note to B, though not negotiable, and B assigns it to a third person, A is not trustee to B, but the trustee must, in his examination, disclose the assignment, and the assignee must enable him to do it.

4 Mass. R.  
608, Dix v.  
Cobb, and  
Whitney, his  
trustee.

§ 7. Whitney, the trustee, stated he owed Cobb about \$15, on book account; that after the service of the writ on him, (trustee), an assignment of it was shewn to him, and he was requested to pay it to the assignees, and showed the deed of assignment &c., annexed to his answer, dated before the service; trustee discharged; also held, if the plt. thought the assignment fraudulent, he might have attached as trustees, the assignees, and compelled them to discover on oath. *Per curiam*, The attaching creditor cannot be on a better ground than his debtor, and the plt. can have no better claim on the trustee than his principal has.

4 Mass. R.  
514, Wells v.  
Bannister &  
al.

§ 8. In this action, it was decided, that if the son build a house on his father's land, expecting him to devise it to him, the father is not trustee to the son for the value of the house. The father made no contract, expressed or implied, to pay for it, and "he ought not to be made the owner of the house against his consent."

5 Mass. R.  
183, Oliver v.  
Smith, and  
Paine, his  
trustee.

§ 9. So held, in this case, that a bankrupt's assignee is not liable to be attached as his trustee, by his surety in a custom-house bond, who has paid it; but the surety must directly sue the assignee of the bankrupt; the statute expressly gives him

this right of action ; and the assignee has no goods of the bankrupt's, as to which the assignee is answerable as trustee.

§ 10. Held also, if, on an execution, the officer receive the money, he is not trustee of the judgment creditor, until he has demanded the money of the officer, though he has returned the execution ; till so demanded, it is in the custody of the law.

§ 11. Quint alone clearly was not trustee ; and Estes, the deft., on one transaction, owed Merrill \$697.99 ; on the second transaction, it appeared Estes owned a farm in Bethel. He proposed to sell it to Quint, to be paid in part in logs. By agreement between Estes and Quint, one Holland and Merrill appraised the farm at \$1200, and Quint's logs at \$700 ; the farm was mortgaged to one Powers for \$750 ; and it was *verbally* agreed that Quint should pay Estes \$500 in part, and that he should sell the logs of Quint to Merrill ; and he *verbally* agreed to take up the mortgage, and to indemnify Estes against it. Quint received the conveyance of the farm, and paid Estes \$500, and agreed to deliver the logs to Merrill, who, *after he was summoned*, discharged Powers' mortgage, at about \$750, exceeding the agreed price of the logs. Held, Merrill was not trustee to Estes, for there was no contract between Merrill and Powers ; and "Merrill's engaging with Estes, as a consideration for the logs, to take up Powers' mortgage, was not a contract, or sale of lands, or of any interest in or concerning the same, so as to be within the statute of frauds : " so Merrill must be viewed as engaging with Quint to disencumber his farm of the mortgage, and this he had honestly done, though after summoned.

§ 12. When Field, the deft. and principal, absconded, he left with Frink, the trustee, Field's note for \$500, to Frink, without his privity, and owed him a prior debt of \$530.94 ; to secure this, Field gave his note for \$2000, and a mortgage of land worth \$1500. Frink only wanted security for his just debt. Held, Frink was not trustee ; he had no chattels of Field's ; the *lands mortgaged* were not effects within the statute ; for being fraudulently mortgaged as to creditors, they might be taken in execution by the plt. or by Field's other creditors. Costs to Frink, as he submitted to an examination the first term. 15 Mass. R. 127. Held, a trustee, to whom his principal conveyed real estate, is not bound to answer any questions that may tend to impair, or to impeach his title to it ; otherwise, as to answers that will not effect his title.

§ 13. Before sued as trustee, the deft., Bacon and Silas Richardson, for the deft's. debt, had given one Maxwell two notes of hand ; by one, they jointly and severally promised to pay him five tons of English hay, to be delivered on the deft's. farm in July, 1808, the original suit then was pending ; by the

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5 Mass. R.  
319, Pollard  
v. Ross &  
trustee.

5 Mass. R.  
330, Owen v.  
Estes, & his  
two trustees,  
Quint &  
Merrill.

5 Mass. R.  
390, How,  
jun. v. Field  
& his trustee,  
Frink.

6 Mass. R.  
60, Jewett v.  
Bacon.—  
Scire facias.

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other note, they jointly and severally promised to pay Maxwell seventy-five hundred weight of English hay, to be delivered at the deft's farm, July, 1809; this *scire facias* being then pending. In July, 1808, Richardson paid the first note, and delivered it to the deft. without his order or request; since which he has repaid Richardson, his surety, a part. Held, Bacon was not trustee; but adjudged to pay costs, not having submitted to an examination in the original action. He was only bound to deliver the hay at the place and times agreed, and, at those times, neither the promisee nor officer was ready to receive it; and Richardson, not being a party to this trustee suit, has a right to discharge the first note, as to himself and Bacon, even against his consent.

6 Mass. R.  
166, Penni-  
man & al. v.  
Ruggles &  
trustee.

§ 14. In this action the court decided that an auctioneer selling goods by order from the sheriff, and receiving the money for them, is accountable only to the sheriff, and cannot be held as trustee of those who may have claims on the sheriff, for the proceeds. There was no privity between Ruggles & al. the defts. and Jutau the auctioneer. He must account with the officer only; and the auctioneer has no information, but to make an imperfect disclosure only, on which the right of property ought not to depend.

6 Mass. R.  
193, Erick v.  
Johnson,  
Loring & al.  
his trustees.

§ 15. Held, where an insurance broker had adjusted a loss with the agent of a party, in whose name the insurance was effected, and had charged the several underwriters with their respective proportions of the loss, and credited the party in whose name the insurance was effected, with the amount of the loss, by setting it off against his premium notes, pursuant to an agreement in the policy; the underwriters were not trustees to the real party in interest in the policy, though the policy was effected in the name of "N. B. and whoever else it might concern."

7 Mass. R.  
259, Cheaty  
& al. v.  
Brewer &  
Seaver, his  
trustee.

"When the writ was served on Seaver, he had, as county treasurer, \$21.25 due to Breeder as a juror. Held, not trustee; also generally a public officer, who has money in his hands to pay a demand which one has upon him, merely as such public officer, cannot for that cause be adjudged trustee.

7 Mass. R.  
271, Barnes  
v. Treat &  
Allen, his  
trustee.

§ 17. In this case the general principle was settled, that an executor cannot be charged as trustee of one to whom a pecuniary legacy is bequeathed by the will of the testator. Allen, the trustee, was summoned before he proved the will. Sedgwick J. said, "pecuniary legacies in the hands of an executor, are not goods or effects;" (though under the Province act deemed such;) nor are they credits. A legatee is no creditor of the testator.

7 Mass. R.  
438, Maine  
F. & M. Ins. Com. v. Weeks & his trustees.

§ 18. In this case the trustees of Weeks, had severally

sundry demands against him, and where his sureties in custom house bonds, and received of him a conveyance of sundry effects to answer their demands, and as their indemnity on account of said bonds. As further security he delivered to them two promissory notes, payable to him and another, or order, and endorsed in blank, to hold them till ascertained if the other property would be insufficient. Afterwards it was found these notes were not necessary to their security; but Weeks had made no demand to have them returned to him. Held, that these bailees were not trustees of these notes. General principle held, to wit, "to charge the trustees, it is necessary that the principal have a cause of action against them, or the trustees must have personal chattels in possession belonging to the principal, capable of being seized and sold on execution." Negotiable notes are not such chattels.

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§ 19. The question was, If J. Barrett was trustee of Cook. Barrett was administrator of the estate of Peter Barrett. Before he died, Cook sued him to recover the value of certain hides. This suit was pending at the time of the trustee's answer; and the deceased's estate was insolvent. *Per Curiam*. "No person deriving his authority from the law, and obliged to execute according to the rules of law, can be holden by a process of this kind." The reasons of the cases decided as to public officers, apply to the case of an administrator.

8 Mass. R.  
246, Brooks  
v. Cook &  
his trustee.

§ 20. Giles Lodge was summoned as trustee of Naylor, Summers & Milton, defts., copartners at Leeds in Great Britain. It appeared Lodge held the proceeds of goods consigned to him by said Summers and Milton, and one Birthwait, also copartners at said Leeds; this last house being the successors of the former firm. Held, Lodge was not trustee. He was sued as the trustee of A, B, & C; and proved to hold property of B, C, & D, different persons; and see *Fish v. Her- rick & al.*; Ch. 52, a. 4.

9 Mass. R.  
490, Upham  
v. Naylor &  
al. & Lodge,  
trustee.

§ 21. Crosby, summoned as trustee of Coates, stated that, when summoned, he held \$529, bills of the Hillsborough bank, which belonged to Coates, and which Crosby presented at the bank for payment, and that was refused. Held, Crosby was not trustee; that these notes or bills were not goods, effects, or credits of the principal debtor in Crosby's hands.

9 Mass. R.  
537, Perry v.  
Coates &  
trustee.

A debt payable at a future day on a contingency, is not a subject of foreign attachment within the tenth section of said act.

3 Mass. R. 68.

§ 22. Joseph Otis, the supposed trustee, was agent for an insurance company, in London, against fire, and executed for them a policy of insurance, on which a loss was claimed. Held, he was not trustee of the assured.

8 Mass. R.  
504, Wells v.  
Green & trus.

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12 Mass. R.  
140, Thomas  
v. Goodwin  
& al.

13 Mass. R.  
215, Gordon  
v. Webb & al.

§ 23. The person summoned as trustee had received goods of the principal debtor, under circumstances indicative of fraud, and such as would have made him trustee; but, before summoned, had paid debts of the principal to the amount of said goods; was held not trustee.

§ 24. If the trustee disclose an assignment of the debt to A, the court will not yield to suggestions by the plt., that the assignment is fraudulent; as for such purpose A should have been made trustee.

ART. 6. *Proceedings in these actions.*

4 Mass. R.  
472, Whit-  
man v. Hunt,  
& Fish his  
trustee.

§ 1. In this suit the court decided, 1. In this process the court is "obliged to consider all the answers of the trustee as true:" 2. If he answer falsely, the plt. may have a special action on the case against him, on the ninth section of said act of February 28, 1795. In this action the trustee was first examined in the Common Pleas; secondly, in the Supreme Judicial Court.

1 Mass. R.  
117, Perkins,  
jun. v. Park-  
er.

§ 2. *Assumpsit* on a note to deliver mules. Held, a plea in bar, that the deft. had judgment against him as trustee, on said statute, was good, though no execution had issued on such judgment; and though it did not appear the trustee had paid, on the judgment, any part of the sum he had in his hands as trustee.

2 Mass. R. 96,  
Comstock v.  
Farnum &  
Palmer, his  
trustee.

§ 3. Palmer, the trustee, stated he had given two notes to Farnum, payable in horses, at a day certain, after the service of the summons; and that he understood by common report, and that it was spoken of as a matter of general notoriety, in the place where both parties lived, that the said notes had been assigned to a third person, for a valuable consideration, before he, the trustee, was summoned. Held, no evidence collateral to the answer of the trustee can be admitted. Trustee himself offered such evidence to prove the notes had been assigned; but it was rejected, and he adjudged trustee; but it does not appear, the day for the delivery of the horses had arrived. Parsons C. J.—"The question whether a person summoned as trustee of an absconding debtor shall be held or not, is always decided by the facts disclosed by the trustee's answer." These notes were not negotiable.

6 Mass. R.  
201, Cleve-  
land v. Clap  
& Wheeler.

§ 4. This was *scire facias* against the defts. who had been summoned as trustees of Hudson & Smith, and did not appear in the original action; but came in on the *scire facias* &c. Held, the underwriters ought not to assent to the assignment of a policy, if they mean to look to the assignees for the premium, till they get from them security for it. The trustees were underwriters, and assented to the assignment; and the court also, in this case, said, "we must take the usage to be as stated by the trustee," in this action, though whether it be

correctly stated we know not. Several rules as to costs ; and, generally, the trustee can have no costs, unless he submits himself to examination the first term. CH. 192.  
Art. 6.

§ 5. In this suit it was decided, that a stranger to an action, in which a trustee is examined, is not concluded by his examination from proving that he did not disclose all the facts he knew ; or that he had collusion with the plt. or deflt. in such action. But when a party produces a trustee's examination, as evidence of his confession, he ought to be bound by it. 6 Mass. R.  
210, Andrews  
v. Herring.

§ 6. *Scire facias*. The plts. got judgment against Haley, and had execution against his effects, in Stevens' hands. Officer returned, he could not find any effects &c., who refused to disclose and expose sufficient effects to be taken to satisfy the execution ; hereupon this *scire facias* was brought. Plea, *nul tiel record*, and issue. On producing the record, the judgment was against the principal for damages and costs, and execution awarded against him, his goods, and estate ; also against his effects in the deflt's., the trustee's, hands. The *scire facias* recited a judgment for the damages and costs against the goods, effects, and credits of Haley, in Stevens' hands. Held, a material variance ; for the judgment produced in evidence, was a regular one against the principal, and of execution awarded against his effects &c. ; whereas the *scire facias* only described a judgment for damages and costs, not against the principal, but only against his effects, in his trustee's hands. Plts. had leave and amended. Plea in bar, the officer had never required the deflt. to expose effects &c. Plts. traversed this allegation, and issue. To this replication a general demurrer. Held, the replication was good. The Court observed, that if the allegation was immaterial, the demurrer could not prevail ; and if material, the issue tendered ought to have been joined. 15 Mass. R. 473. *Scire facias* does not lie against a trustee till execution issued and returned not satisfied. Lies against him adjudged trustee, or his executor or administrator, though the principal die after judgment against him, if his estate be not insolvent. 6 Mass. R.  
339, Dyer &  
al v. Stevens,  
trustee of  
Haley.

§ 7. Held, a trustee cannot plead for his principal, unless he has effects in his hands, on which the process may take effect ; nor can he plead in his own name, except where he is personally injured by the process ; as where he is the only person summoned as trustee, and is called to answer out of his county. But a trustee having effects, may, in the name of his principal, take any legal exception in abatement ; as the want of a regular service on the principal. 7 Mass. R.  
8, Blake  
v. Jones, and  
Taggart, his  
trustee.

§ 8. Also held, in this case, that the service of a summons on one as a trustee, by leaving a copy at his dwelling house, 10 Mass. R.  
25, Touro v.  
Contes &  
trustees.

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was not intended for the case of one absent by sea, but to guard against the fraudulent avoidance of persons liable. 2. Where one was summoned, while at sea, by a copy left at his house, and, at the first term after his return, disclosed, and was discharged, he was entitled to his costs.

10 Mass. R.  
343, Tingley  
v. Bateman  
& trustee.

§ 9. The plt., deft., and person summoned as trustee, were all inhabitants of another State; and the only service of the writ was on the supposed trustee. The court dismissed the action *ex officio*. This matter was pleaded in abatement; and to this plea the plt. demurred generally. Held, the plea was bad. Dismissed *ex officio*.

4 Mass. R. 81,  
Barker v.  
Tabor & al.

§ 10. It is bad practice to insist the name of a fictitious trustee in order to give the court in one county jurisdiction of the suit.

4 Mass. R.  
107, Wilcox  
v. Mills.

§ 11. Costs as above. Trustee has none till he submits himself to examination on oath. *Prescott v. Parker* and trustee.

§ 12. Costs to trustee, if summoned out of his county, being the only trustee, and discharged of course; and may be extra costs, 4 Mass. R. 218, and 507; and at a former term trustee pleaded a bad plea in abatement, and this term came in and submitted himself to examination, and discharged; allowed costs only this term, because summoned out of his county &c. But if such a one do not appear in the original action, he cannot plead this in abatement to the *scire facias*.

6 Mass. R.  
212, Lee v.  
Babcock and  
trustee.

One was rightly adjudged trustee on his former statement; and on his new and second statement, he was discharged; held, he was not entitled to costs.

4 Mass. R.  
85 Stackpole  
v. Newman  
& al.

§ 13. If a letter be shewn to a trustee, written not by a party to the suit, nor claiming the property, its signature authenticated, but its contents not, by the trustee's oath, this is not sufficient to introduce its contents as facts disclosed by him.

4 Mass. R.  
81, Barker v.  
Tabor & al.  
and trustees.

§ 14. The general rule laid down in this case, was, that the question, whether trustee or not, depends solely on the sworn answers of the persons summoned, to interrogatories; and the court will not receive a statement of facts agreed to by the plt., deft., and trustees.

Mass. S. J.  
Court. Nov.  
term, 1779,  
Connor v.  
White and  
Nelson,  
trustees,

§ 15. The trustee appeared the first term in the Common Pleas; but not entered that he submitted to be examined. The cause was continued several terms in the Common Pleas, and two terms in the Supreme Judicial Court. He was finally discharged, and allowed his full costs; for when he appeared, he was ready to be examined, if the plt. pleased. So held in another case.

§ 16. *Judgment against a debtor as trustee in Georgia, how a bar to another action.* Assumpsit by an indorsee against the maker of two notes, made at Augusta in Georgia, November 11, 1811, payable to one Billings, or order, and November 19, 1811, endorsed by him to the plt. at Providence, before due. Deft. pleaded a judgment against him as trustee or garnishee in a county court in Georgia, of the promisee, in an action commenced November 21, 1811. Maker and promisee being both citizens of Georgia; said court having jurisdiction of the cause, and said note being disclosed in it. Plea adjudged good, grounded on a statute of Georgia set forth. Though the notes were endorsed before the action in Georgia was commenced, these notes, being made with reference to the laws of Georgia, were discharged by those laws. It seems the law of Georgia empowered a creditor of the promisee to recover against the maker, though the notes had been *bonâ fide* endorsed. But, said the court, the laws of the place where the contract is made, must govern it, for they are necessarily a part of the contract, and are understood as its governing principle. If to give jurisdiction to the court, the name of a trustee be collusively inserted in the process, the principal deft. may plead such matter in abatement.

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Art. 7.

13 Mass. R.  
163, Hull v.  
Blake. Be-  
sides several  
cases cited in  
this digest  
from Mass.  
R. see 1  
H. Bl. 135,  
140.—1  
Caine's R.  
402.—1 B. &  
P. 138.—1  
John's Ca.  
173.—5 East,  
131.—Doug.  
5.

14 Mass. R.  
132.

ART. 7. *Notes on this trustee process in Massachusetts.*

§ 1. It will be observed, that this process, in a few years, in a single State, has been the occasion of a very great number of legal questions, formally referred to the whole court for decision. But many are apt to think that these decisions will settle the law, and that there will not be many such legal questions in future. This is a mistake; for experience proves that whenever the legislature passes new statutes, in vague and general terms, in a case of general concern, giving a new species of suits or actions to the citizens generally, the more decisions there are made on legal points, the more legal questions will there be raised. Witness the statute *de donis*, on which legal questions in England increase to this day. So the statute of uses;—so the statute of frauds.

§ 2. It is not my intention, in these notes, to consider this subject, in fact yet new, at large, but only to remark on a few material points.

§ 3. It has been more than once decided that an existing debt, but payable *in futuro*, may be attached in this process; but on what principle? It has been correctly decided, that the plt. in this suit, can be in no better situation than his debtor, the deft. This principle must be correct and sound, if there be one so in this branch of the law;—for the only right the plt. can have, or any statute, passed on sound principles of law, can give him, is to claim that the debt due from

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the trustee to the deft., and the rights he has against the trustee, be transferred to the plt. by this process, so that the plt. recover of the trustee just so much, and at such time, as the deft. is entitled to by the contract between him and the trustee, or the very right of the case between them; more than this must be a violation of this contract, and of this right. Now what is this contract and this right? January 1, 1816, the trustee fairly contracts to pay the deft. \$1000 in one year; and the deft.'s. only right is to sue for this sum at the end of the year, and not before. In the mean time, he has no right even to call for this debt, and during this year the trustee is entirely free and exempt from any suit whatever; he is not to be troubled at all, and need give himself no concern about paying this debt, till the year ends. This is the exact state of the contract and case, between the deft. and trustee. Their contract, every statute ought to hold sacred, has so fixed it. As to the 10th sect. of the act, often relied on, it only respect a particular case, in which the trustee has engaged to deliver certain specific articles to the deft. on a day subsequent to the summoning the trustee.

ART. 8. *In other States.*

1 Dall. 3, 4.  
—1 Dall. 77,  
80.

§ 1. *Pennsylvania &c.* Rum was consigned to be sold on the consignor's account; and the proceeds first to be applied to pay a debt due to the consignee. Not trustee till this be paid. The property of a State is not liable to this process of foreign attachment: the court inquires into the cause of action: 1 Dall. 154:

Ross v.  
Clarke.

§ 2. Nor is money paid into the hand of a public officer, 1 Dall. 354;—nor is an executor liable to it, 2 Dall. 73, 74, 97;—nor are partnership debts, to answer a separate debt, 2 Dall. 73, 74;—nor a fund remitted to pay particular creditors, 4 Dall. 279;—nor a promissory note negotiated in New York, 4 Dall. 47.;—but debts may be attached before they are due and payable, 2 Dall. 211. So a debt in suit may be attached;—and so a debt due to partners may be attached by a separate creditor of one of the partners, who shall recover a moiety of the amount. 2 Dall. 277, *M'Carty v. Emlen*. Emlen owed M'Carty & Cummings; Cummings died. M'Carty's creditor sued him, and attached Emlen as garnishee. Held, this creditor could recover of M'Carty half of the debt Emlen owed.

Walker v.  
Gibbs & al.  
garnishee.

1 Dall. 152,  
158, 480.—A  
judgment  
against gar-  
nishees, that  
they are  
jointly and  
severally  
debtors of the principal, is good. 1 Day's Ca. 238.

§ 3. A man coming from another place to reside in Pennsylvania, introduces his family, takes a house, engages in trade, contracts debts, and after some time, runs away, with intent to cheat his creditors, is such an inhabitant of Pennsylvania, as not to be an object of the foreign attachment, but is of the domestic attachment. Further,—If an inhabitant of

Pennsylvania avow his intention to emigrate, and is actually on his journey for that purpose, he is not liable to a foreign attachment; he is still an inhabitant. CH. 192.  
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§ 4. A debt being admitted to be due to the debt. by the garnishee, in his answer, judgment may be on motion. A *scire facias*, on a judgment in the Supreme Court against the garnishee, is to be brought in that court, though judgment had been obtained in the Common Pleas against the original debtor, in the same action. 2 Dall. 211,  
212.

§ 5. A foreign attachment will not lie in the Circuit Court of the United States;—but in the Supreme Court of the United States it was decided, that the appearance of the debt. to a foreign attachment in the Circuit Court of the United States, waived all objections to the non-service of the process. Also held, by the same Supreme Court, that under the foreign attachment of Connecticut, an absent person, who is liable for damages for breach of his covenant, is an absent debtor. An action lies on a breach of a covenant of seizin, though there has been no eviction. 2Dall. 396.—  
4 Cranch,  
421, 432,  
Pollard v.  
Dwight.

§ 6. A vessel attached was directed to be sold as a perishable commodity, at the first term, on motion and positive affidavit of the debt, under a foreign attachment. Dall. 379,  
O'Neil v.  
Chew.

§ 7. A rule to take depositions was granted, on notice to the debt., a garnishee, before the return of a *scire facias*, in a foreign attachment. 2 Dall. 78.

§ 8. On executing a writ of inquiry upon a judgment, in a foreign attachment, the debt. is not entitled to produce evidence to the jury. A motion to dissolve this attachment must be made the first term to the court. 1 Dall. 375,  
378—2 Dall.  
79.

§ 9. *New York &c.* A was a debtor to B, and gave a note to C for the amount of the debt, to prevent its being attached by a creditor of B, by foreign attachment; and before any attachment had issued, C endorsed the note to D, who had advanced the money for A. Held, that D, not being privy to any fraud in A, could not be affected by it, and might recover the amount of the note, as a *bonâ fide* endorsee for a valuable consideration. Wash. R. 42. Note was made in Virginia, payable in New York, so governed by the laws of New York. 5 John's R.  
239, 248,  
Warren v.  
Lynch.—  
Other trustee  
cases in New  
York.—1  
Caines, 513.  
—2 Do. 318.  
—1 Johns.  
Ca. 372.—3  
Caines, 257,  
323, 362.

§ 10. After a judgment has been regularly entered in a foreign attachment, it is too late to move to quash it. 1 Dall. 294.

§ 11. *Assumpsit.* Debt. named of New York; plt. and trustees of Nantucket. Service on all the trustees returned, also on Benjamin Whitman, Esq. as the agent of Barker. Barker had no property in this State to be attached;—held, Barker might plead in abatement of the writ, that such supposed trustees were not his trustees, never having had any 12 Mass. R.  
36, Gardner  
v. Barker &  
trustees.

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goods or estate of his in their hands or possession, and that no goods or estate of his had been attached in the suit, and the fact so pleaded being confessed by the demurrer to the plea, the writ was abated. Service on an agent of one out of the State, can be only when his goods or estate are attached; and no effects in the trustee's hands may be pleaded in such cases, as well as shewn on their answers; and the deft. may appear and take the exception, and not waive the exception in the statute. He does not take upon him the defence of the suit, but shews he ought not to do it. The principal, holding the trustee's promissory note, cannot endorse it after attached &c. Kirby, 149. If the principal be out of the State, the suit must be continued. Id. 376. The attachment creates a *lien* on the property attached under the 63d sect. of the bankrupt act. 1 Day's Ca. 117, 136; 2 do. 498.

§ 12. This process, construed as favourably as it can be to the trustee, is hard upon him, as it subjects him to two actions, when his contract subjects him only to one: first to an action on the trustee process, and then to the principal's action who retains the contract. At any rate the statute obliges the trustee to appear and answer in a suit, (the trustee action,) at a heavy expense, rarely reimbursed to him, and much risk; a suit his contract in no degree whatever subjects him to. An executor, owing a legacy, is not trustee. 3 Day's Ca. 436; 4 Day's Ca. 87.

13 Mass. R.  
80, Kidder  
& al. v.  
Packard &  
Gowin.

§ 13. *Scire facias* against Packard & al. to have execution against them, as trustees of B. Butters. The original writ was served on Packard, a merchant living in Boston, but not on Gowin, a merchant residing in the Havanna, where they, partners, had a commercial house established. The house was indebted to Butters for money he advanced to it on their joint receipt; but it remained in Gowin's hands. Held, Packard was not trustee, and the general principle seems to be, that a partner, residing here in such house, is not trustee of its creditor, on account of money advanced to it at the place of their domicil. This money was to be accounted for, by the terms of the receipt, at the Havanna. Debtors who are partners here, must all be summoned and made parties to the suit.

#### ART. 9. *Videlicet* or *scilicet*.

§ 1. These words, or *to wit*, are often used, and in almost all branches of pleadings; and in many different ways. The object here is to consider the principles applicable to this part of pleadings under a *videlicet*; and it is believed it will be found that several distinctions have been made, and rules laid down, in this respect, but to little purpose; and that it is not very material, generally, whether facts are stated under a *videlicet* or not.

§ 2. Where the time laid in a declaration under a *videlicet* is material, and the gist of the action, it shall be taken to be the true time; if repugnant, is to be rejected as void; or if consistent, is to be held a direct affirmation. 1 Phil. Evid. 171; 2 Do. 2. CH. 192. Art. 8.

§ 3. It is a material rule, wherever an averment is material, it is traversable, though under a *videlicet*. This is clear. 4 Johns R. 450, Vail v. Lewis. 1 W. Bl. 496

§ 4. As in debt on a bond, the deft., to entitle himself to a set-off of any cross demand, must, in his plea, state the sum really due on the bond. In this action he stated in his plea, the sum of £735 was due, and this under a *videlicet*. The plt. replied, there was more due on it than £735, namely £835. Os. 7d.; and *hoc petit*. The deft. demurred specially to this replication; and for cause said, the plt. had given no answer to the plea; neither admitted or denied the plt. was indebted to the deft., as he had alleged; and argued, that as he had pleaded the £735 due, under a *videlicet*, he was not bound to prove that precise sum, but might prove a less, or a greater sum. But Lord Kenyon C. J. said, "where an averment is material, the addition of a *videlicet* does not render it immaterial;" and Grose J. added, it is still traversable. Osborne v. Rogers, 1 Saund. 267. 6 D. & E. 460, Grimwood v. Barril.—1 Phil. Evid. 171.—1 Ld. Raym. 140.—New R. 463.—6 D. & E. 265.—4 Taun. 310.

§ 5. Debt on a bond, £11,619. 11s. 4d. Plea, on *oyer* stated, there was due on it, £5809. 11s. 8d. and no more, to wit, at —; and that the plt. was indebted to the deft. in a large sum &c. The plt. replied, there was due on the bond a larger sum than said £5809. 11s. 8d. in said plea mentioned, to wit, £6930. 3s. 9d.; *hoc petit* &c. To this replication the deft. demurred; and for cause said, the plt. had attempted to put in issue immaterial matter &c., and had not denied, confessed, or avoided the plea &c. The plt. argued, that the plea stated a certain sum, £5809. 11s. 8d. due on the bond, and no more, without laying it under a *videlicet*; in consequence of which it became necessary to deny it in the replication, otherwise the plt. would have been bound by that precise sum, as having admitted it by not traversing it, made material by the statute. 3 D. & E. 66, Symmons v. Knox.—1 Phil. Ev. 171.—2 Do. 2.

Lord Kenyon C. J. said, if the plt. did not deny the sum stated by the deft. as due on the bond, he admitted it. Hence, necessary to traverse it. "Here too, (he observed) the sum is not pleaded under a *videlicet*; and it has been long settled, that where any thing is laid under a *videlicet*, the party is not concluded by it; but he is where there is no *videlicet*, it would therefore, be very hard on the plt. if he were bound by the sum which the deft. has stated not under a *videlicet*, without having an opportunity of traversing it." Grose J. said, "then as the deft. set forth what was really due, without a *videlicet*,

CH. 192. the plt. would be taken to have admitted it, if he had not  
 Art. 8. traversed it in his replication."

§ 6. Words cannot be rejected as *surplusage* where the allegation is sensible and consistent, in the place where it occurs, and not repugnant to antecedent matter, though laid under a *videlicet*, and however inconsistent with an allegation subsequent.

§ 7. The *videlicet* has no tendency to make the fact alleged under it material or not; but if so or not, depends on the subject matter. Instance the two cases stated by Willes J. 1. Case on a promissory note, and generally laid in the declaration, that after passing the statute, to wit, such a day, such a note was made. In this case the very day under the *videlicet*, "is certainly material, because the same identical note must be proved; and it can be ascertained only by the date; and if it be of another date, it is another note." Here, in the nature of the case, the day of the date is essential and material, whether laid under a *videlicet* or not: 2. In ejectment the demise is laid on such a day, and the declaration goes on, and says, that afterwards, to wit, on such a day, the deft. ejected the plt.; "this day is not material," because if the deft. ejected on any day, after the demise, it is sufficient. Hence, the day of ejecting is thus immaterial, in the nature of the case; and in no sense because laid under a *videlicet*.

§ 8. What is immaterial under the *videlicet*, may be rejected; as in debt on bond, plea, payment before the day; but this time of payment being pleaded under a *videlicet*; held, the plea good, on the act to amend the law, as a payment before the bill sued; then the issue joined was material.

§ 9. But there are cases in which words in a *videlicet* do not vitiate; as trespass for assault and imprisonment on such a day, and continued the imprisonment a long time, to wit, twenty-five weeks. This twenty-five weeks was mostly after the action was commenced, and so the action was brought too soon; but held, these words did not vitiate what was laid in time; also, the declaration stated the deft. *did* imprison the plt.

§ 10. Debt on bond, condition to pay £—, on or before such a day. Plea, on oyer, payment before the day, to wit, such a day. The plt. demurred; and objected, that the deft. ought not to have put in issue the particular day, but ought to have pleaded, he paid on or before the day; but the court said, he had pleaded payment before the day, according to the condition to pay *on or before* the day: and the demurrer admitted the plea to be true, and confessed payment made before the day. Plt. allowed to withdraw his demurrer and reply, on paying costs.

5 East, 244,  
 The king v.  
 Stevens &  
 Agnew.

Willes, 390,  
 Fell's case.

2 Stra. 954,  
 Cowne v.  
 Barry.

2 Stra. 1095,  
 Webb v.  
 Turner.

2 Wils. 173.

11. The words *videlicet*, *scilicet*, *viz.* or *to wit*, have several uses in other matters, as well as in pleadings; as, to express particularly, and make certain, what was before general, or doubtful, the same as the words, *that is to say*. Hobart observes, that *videlicet* &c. is not a direct several clause, nor direct entire clause, but it is *inter media*. It is not a substantive clause of itself. You cannot begin a sentence with it, nor make one of it, by itself; but it is *clausula acillaris*; "a kind of interpreter." "Her natural and proper use is to particularize that, that is before general;" "or distribute that, that is in gross, or to explain that, that is doubtful and obscure."

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Hob. 170,  
Stukely v.  
Butler.

§ 12. 1. If repugnant to the premises, or to what precedes, as a trespass with a *continuando*, till the day of the writ purchased, *scilicet*, such a day, which is not the same day. Here, the *scilicet* is utterly void. 1 Saund. 118, 169, &c.

§ 13. 2. It must not increase or diminish; as if I have in D. black-acre, white-acre, and great-acre, and grant to J. S. all my lands in D., that is to say, black-acre and white-acre, yet great-acre passes also; but if I add under the *viz.* land lying out of the town of D. it shall not pass.

§ 14. 3. If the grant preceding be entire, the *viz.* cannot sever it; as in partition among three, one granted to the other two a rent of £5 a year, that is to say, to one 50s. and to the other 50s.; yet held, an entire rent, and the *to wit* has no force to divide or sever it.

§ 15. 4. It may work a restriction, where the former words are not express and special, but indifferent; as a grant to A and his heirs. *viz.* heirs of his body. This is an estate in tail.

§ 16. 5. It may explain; as a grant to two, *habendum* to them; *videlicet*, the one moiety to one, and the other moiety to the other, this is valid; and the *videlicet* thus severs; for the substance of the premises is not altered by it; for both of them have the whole in use in common, as they should have had it by the premises jointly, which is but a point, or quality, or incident altered.

§ 17. But if I grant twenty acres to two, to wit, ten acres to one, and ten acres to the other, this *scilicet* is void, as being repugnant to the preceding grant, which is joint of the twenty acres; but the *videlicet* is several of ten acres to each: so if I have lands in a hamlet, and also in another part of the town, and grant lands in that town, *scilicet*, in the hamlet; only those in the hamlet pass. But if I grant all my lands in the whole town, *viz.* in the hamlet, all the land will pass, and the *viz.* is repugnant and void.

§ 18. It is said, that the omission of a *scilicet* will render it necessary to prove sums, time, and place, precisely as laid, <sup>2 Phil. Ey.</sup> 2, note.

CH. 193. though had it been inserted, they would have been regarded  
 Art. 1. as immaterial, and not the gist of the action. Cites 2 Saund.  
 291 e.; 3 D. & E. 67, 68; 3 Maule & Sel. 175; *sed vide*,  
 6 D. & E. 265. Added, the correctness of this last position  
 is denied by Chitty, his Pleadings, 1 Vol. 308, n. 6; and  
 Phillips only admits it partially. From a full view of the  
 several cases in this article and others, it appears clear that  
 if a matter be material, it cannot be made immaterial by being  
 pleaded under a *videlicet*, but is traversable, though so plead-  
 ed; but if a matter be immaterial, laying it under a *videlicet*  
 still leaves it so, and surplusage that may be rejected; but in  
 several cases, if not laid under a *videlicet*, it cannot be rejected.  
 In short, this part of the law of pleadings seems to be thus:  
 if the matter be really material, it is unimportant whether it  
 be pleaded under a *videlicet* or not; for whether so or not, he  
 who pleads it must support it, and the other party must an-  
 swer it. But if really immaterial, the party that pleads it under  
 a *videlicet*, reserves the right to have it still viewed as imma-  
 terial, and such as may be rejected; whereas if he do not  
 so plead and distinguish it, he may make immaterial matter  
 so far material as to be held to support it, in many cases, but  
 not all; for certain it is, that not every immaterial matter, not  
 pleaded under a *videlicet*, is to be supported or answered,  
 though averred not under a *videlicet*. See Ch. 62, a. 2, s. 15;  
 a. 4, s. 5; and Ch. 174, a. 16, &c.

7 Wentworth, 580, refers to several forms of pleas as to  
 foreign attachments.

## CHAPTER CXCH.

### SYNOPSIS OF PLEADINGS.

HAVING thus, in the preceding pages, gone through a  
 course of pleadings in *civil* actions generally, though on a limited  
 scale, yet on as large a one as is admissible in a work of this  
 kind, embracing near all the branches of American law; and  
 about to give a *sketch* of pleadings in *chancery*, and to pursue  
 a course, briefly, of pleadings in *criminal cases*, it may be  
 useful here to insert a *synopsis of pleadings*, so as to give a  
 general connected view of the material outlines of an entire  
 system of pleadings. In this way, the several parts of such a  
 system are more readily understood, and the reasons of them,

and their connexions with, and bearings upon, each other, are more easily perceived. This *synopsis* is not formed from any particular model, but from a general view of the numerous law books, English and American, ancient and modern, in use in the United States; nor has it been an object to have this *synopsis* very minute; and though it is far from being perfect, yet, it is believed, it is more full and correct than any other that has been formed in this country. Indeed it is not known that any one has been attempted upon the scale of an entire system of pleadings, beginning, as we ought, with the institution of the suit, and ending with the execution. Such a system, to be well understood, and complete, involves almost every branch of the law; as pleadings insert themselves more or less into almost every part of it; and to know if a plea be bad or good, the proper one, or not, on any subject, it is usually necessary to understand the law on that subject.

Сн. 193.  
Art. 1.

ART. 1. § 1. All pleas are either in *civil* actions, in which the plt. sues to recover some property from the deft., or a compensation for some injury to the plt's. person, reputation, or estate; or in some *criminal* cases, in which the public prosecutes the deft. for some offence.

§ 2. In every judicial proceeding there must be a plt. or public to prosecute; a deft. sued or prosecuted, and a tribunal to decide; or to ascertain the facts by proper evidence, and to declare the law thereon.

§ 3. In every process in law and equity, the first question is, Has any wrong been done, or offence committed against law? next, What is the kind of action or process applicable to the case? and then, What is the judgment to be rendered on it, the object of the suit? as to this all proceedings in court ought to have reference.

§ 4. All matters in pleadings are regularly in *civil* or *criminal* suits, and in respect to courts of law and courts of equity; and the regular parts in either, are, 1. The declaration or charge against the deft., or offender, summarily or at large: 2. His defence, in which he may attempt to defeat the charge made against him, by pointing out some *formal* defect in it; or in which he may aim at delay, or in which he may justify, totally deny, or excuse: 3. The plt's. replication to the deft's. plea: 4. His rejoinder to the plt's. replication: 5. The plt's. surrejoinder: 6. The deft's. rebutter: and, 7. The plt's. surrebutter &c.

§ 5. There are some other parts in pleadings irregular, *collateral*, and depending on circumstances; as repleaders, as where one party demurs to the other's plea, as being bad in law, or to his evidence as not being sufficient to prove the facts, offers a bill of exceptions, &c., which parts appear here in the following articles.

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Art. 3.



§ 6. The real object of every plea is to state facts truly, so that the law arising on the real facts in the case, may be rightly understood, and administered according to the settled rules of law and decided cases.

ART. 2. *Civil actions.* The proper parts in a civil action, are, 1. The plt's writ, petition, or complaint, including the proper parties, rightly named and described; his counts or declaration containing a *true state of his case in legal form*, whether in account, *assumpsit*, case, covenant, debt, ejectment, land actions, replevin, trespass, petitions, complaints, &c.: 2. The service of the writ and process, whether by summons, attachment, arrest, and imprisonment, or arrest and bail: 3. The officer's return on *mesne* process: 4. The plt's. entering his action, and pursuing it, or retracting or discontinuing it, or becoming *nonsuit*: 6. The def't's. admitting the action by his default; by confessing judgment, by *nil dicit*, *non sum informatus*, &c.: 7. His defence, half, or whole: 8. His *imparlance*.

ART. 3. *Abatement.* Various pleas in these are *dilatory*, and merely suspend the suit for a time only; not to the merits, but for delay, and for some defects in form; the object is to abate the plt's. writ, petition, or complaint, and to put him to commence anew for the same thing: 2. *Disability* in the plt. to sue; for that he is an alien enemy, one outlawed, attainted of treason or of felony, or other incapacity, that disables him to sue at present, but which incapacity may, in contemplation of law, be removed at some future period: 3. Pleas showing the def't. cannot be sued in such form, or by such a description, as that he is sued alone, and has partners, is misnamed or described: 4. Exceptions to the declaration, as want of legal form, matters joined, not to be joined, and other legal defects therein: 5. To the writ, as defects in it, in the service, return, and other legal defects in the officer's acts, and doings thereon: 6. Exceptions to the action of the writ, as that it is case, where it should be trespass &c., another action pending for the same thing, *actio non accrevit*, *non tenure*, or disclaimer, variance, &c.; after these, if attempted in any case, and defeated, then, generally, comes the plea to the action itself in bar thereof.

§ 2. The above has long been the settled order in pleading; because by this, each subsequent plea admits the former; as where the def't. pleads to the *person* of the plt. he admits the *jurisdiction* of the court, by not taking his exception to it in the first instance, as if that has none of the suit; any plea but to the jurisdiction, is idle. When the def't. pleads to the *court*, he admits the plt. is able to come into court, and to implead him, and that he there may be properly impleaded. In pleading to the *writ*, the def't. admits the count to be good in form; and in pleading to the *action* of the writ, he allows both count and

writ to be good, as it must be nugatory and idle to plead to the action, as that it ought to be *assumpsit*, and not debt &c., if the count or writ be bad, except he waive his objection to the defect in either; and if the deft. pleads in bar to the action, he answers to the right in demand, and admits the court's jurisdiction, the plt's. ability to sue the action, and all the other matters above stated in this article.

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Art. 6.

ART. 4. Matters usually pleaded after the usual time for pleas in abatement, is out, and before pleas in bar, are made: as, 1. Oyer of deeds: 2. The warrantor is vouched in to defend: 3. The remainder-man is prayed in aid, or called in to help the deft. plead: 4. The parol demurrer is had, or proceedings stayed till one comes of age in some certain cases: 5. Cognisance of the cause is claimed by some one person, court, or corporation, asserting his or their exclusive right and jurisdiction to try it: 6. Tenders and bringing monies into court, in bar of further damages &c.: 7. *Protestandoes*: 8. Estoppels: 9. Averments: 10. Giving colour &c. Yet these matters, though usually pleaded as above, have no particular fixed place in the order of pleadings; nor have notice or request; nor pleas since the last continuance, but each is pleadable according as the facts in the principal pleas may happen to be, and in such ways as is shown in pleading these various pleas in detail.

ART. 5. When the deft. can have no further expectation of availing himself of any of the above pleas, he usually comes to his plea in bar of the action, and on the merits. In this plea he denies the thing charged against him was done; or he excuses it by saying it was done by accident, or without his fault; or he justifies the thing done, by insisting on something that made it lawful. His denying of the charge must be by pleading the general issue; matter of excuse may be pleaded or given in evidence; but a justification must be pleaded, and a right issue must be formed, formal, material, and consisting of "one single, plain, and clear point;" but this issue or point may include in it *many connected facts*, material to constitute the title or right, and this in criminal, as well as in civil causes; many pleas pleaded, proper in each action, as in account, *assumpsit*, case, covenant, debt, detinue, ejectment, land actions, replevin, &c. in bar.

ART. 6. These pleas in bar are general or special; general, as when the deft. pleads the plt. accepted something in satisfaction of the demand sued; or released it; or the deft. tendered amends; or that the demand has been settled by accord and satisfaction; or by award; or when the deft. pleads *coverture* in bar, duress, infancy, menaces, judgment in a former action for the same thing; never executor, administrator, bailiff, or receiver; no effects in his hands as trustee; *non damni-*

CH. 193. *ficatus ; non est factum*, not guilty, *nul tiel record* ; payment at the day ; payment after the day ; fully administered ; saved harmless ; usury ; act of limitations &c.

Art. 9.

Special, according to the special matter that excuses or justifies the deft. These special bars vary almost infinitely in different actions, according to the nature of the matter, excusing or justifying. In some cases this matter, by time and practice, has been reduced to certain established forms ; when so, they must be used. But generally, in forming a good special plea in bar, the only grounds to rely on are, good sense, good logic, and sound legal knowledge.

ART. 7. *Replications* &c. may also be general or special ; general, as by new assignment. Was of the deft's. own wrong, and without the cause he alleges. In all pleas, certain rules are always to be observed ; as that they be clear and concise ; in proper order, and in proper time ; that there be in them no uncertainty, no duplicity, no departure, no repugnancy ; not argumentative, not negative pregnant ; without surplusage ; proper traverses, and proferts of deeds &c. ;—no sham pleas ;—pleas according to the operation in law ;—rules to avoid prolixity in pleadings ;—what is substance, and what form. In some cases the deft. may plead two or more pleas in bar ; but his pleas must be consistent. This pleading double, is by the 4th & 5th of Anne, adopted here ; but does not extend to criminal cases ; nor to *qui tam* actions ;—nor can a party plead and demur to the same part of a declaration, or plea &c.

ART. 8. *Demurrers*. A demurrer may be to the count or declaration ; or to the plea or bar, or to other parts of pleadings. Also on an aid-prayer, or voucher, the demurrer admits the facts stated by the other party, and makes a question, if by law he has a right to recover, if his facts be true ; or a right to have judgment on his defence pleaded by him &c ; and when a demurrer is to evidence, it admits it, but denies its operation in law. Whenever there is a want of matter or substance, advantage may be taken of it, on general demurrer ; but where there is only a want of form, advantage can be taken of it, only on special demurrer, pointing out the very defect. The question of a demurrer is always a question of law to be decided by the judges ; but generally an issue in fact, is to be tried and settled by the jury.

ART. 9. After the question is settled, and issue is joined, trials of various kinds follow : as, 1. By record : 2. By inspection : 3. By certificate : 4. By witnesses : and 5. By jury, summoned, impannelled, and sworn, according to law. After proper challenges have been considered &c., the jury must try the issue, or issues in the case, on such legal evi-

dence as the judges admit to be given to the jury, and return their verdict general, or special. This being received, must be affirmed. In some cases, the jury only inquires of damages. The verdict, in all cases, must be good in substance and form.

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Art. 14.



ART. 10. After verdict, and before a final judgment, there may be, 1. A repleader : 2. A bill of exceptions : 3. A new trial moved for, and granted, on various grounds : 4. A motion in arrest of judgment. Judgment may be interlocutory, or *de bene esse*, or final. After judgment below, an appeal often lies ; or a review in several cases. Also an *audita querela*, and a *scire facias*, or a writ of error. *Certiorari* before or after, as the case may be. If there be nothing to prevent judgment going into effect, execution issues for possession and costs, or for debt, and damages and costs ; or costs only, for the debt, as the case may be ; and it issues against the estate or body of the party, except where sued in *auter droit*, or as trustee, on which execution, there must be a return in many cases ; and, in some, the execution and extent must be recorded in the county registry as a material part of land titles.

ART. 11. Amendments and matters aided by verdict. Amendments may generally be made in most stages of judicial decisions, as soon as defects are discovered, and often even after error brought and argued. Amendments are at common law, and these are on the same principles, in both civil and criminal suits. Amendments, however, are mostly by statute law, and these are only in civil suits. A verdict may cure a title defectively set out, but not a defective title. The issue and verdict must agree in substance, and the verdict must find all the matter in issue, one way or the other.

ART. 12. Pleas in certain particular cases, framed on the facts and principles of the case, as in *audita querela*, *mandamus*, *procedendo*, prohibition. As to the admiralty jurisdiction, *quo warranto* informations, and injunctions.

ART. 13 Courts in the United States, generally constituted by Federal or State constitutions or statutes ; by them their limits and powers in all causes defined. But pleas and proceedings in them, are in part on these constitutions and statutes ; and in part, and mostly, on the principles of the common law, a concise view of the pleas and proceedings, shew correctly how far our courts proceed according to the rules of the common law, and English practice ; and how far on grounds peculiarly American.

ART. 14. Appeals from lower to higher courts, as they always are, and, in sundry cases, given by statutes, not by common law, or constitutions.

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Art. 20.



ART. 15. Reviews on their several principles often, but not always, in the same court, not known in English or Federal practice, nor in many of the States : original, in Massachusetts, in an ardent desire to preserve, as far as possible, the benefits of the jury trial. Given by particular statutes only. Regulated and given solely by these.

ART. 16. *Scire facias*. A writ always founded on a record, as a judgment, recognisance, or letters patent. Always to the deft. to shew cause why the recognisance or judgment shall not be carried into effect against him ; or to shew why letters patent, he claims under, shall not be repealed, or declared void &c. So far pleadings respect civil actions generally. In the following cases, some one kind of suit only. As

ART. 17. *Partition*. Pleas and proceedings in, partly at common law ; so far nearly the same in the several States ; and partly in statutes, and so far different in many respects, as these statutes are differently constituted in different States. It binds the possession, not the mere right of property. One must have a right of entry into the land, at least to have process of partition of it ;—lies among those who hold together, and undivided, in fee simple and lesser estates.

ART. 18. *Trustee actions*. Pleadings are wholly founded on statute law. In imitation of foreign attachments in London. Pleadings, as between plt. and deft., are altogether the same as in other personal actions. As between the plt. and trustee, the pleadings are peculiar to this form of action ; but short and few. The trustee's plea usually has but this object, either to deny he owed, when summoned, the deft., or to deny he then had in his hands any goods or effects of the deft's.

ART. 19. Account, assumpsit, covenant, debt, &c., civil actions, and personal, founded on contracts. In each, there are several distinct branches of pleadings, applicable to the subject matter. As pleadings in account. So in assumpsit &c.

ART. 20. Case, detinue, ejectment, land actions, replevin, trespass, and trover, civil and personal actions, founded on torts. In each of these also, there are several pleas. And distinct branches of pleadings, applicable to the subject matter of each action, as pleadings in case for deceit ; of defamation and libels ; escapes, nuisance, officers, emblements ; of ioll, trover, waste, and ways.

§ 2. In covenant, breaches thereof, and pleas in voucher.

§ 3. In dower, in alienage, in error, in *certiorari*.

In debt, annuities, awards, by-laws, and corporations ; bonds, judgments, legacies, penalties, recognisances, and bail ; rent, usury, pleas in debt generally ; accord and satisfaction ; acquittance, discharges, duress, escrows, estoppels, limitations,

*nil debet*, and *non est factum*; *nul tiel* record, oyer, payment, matters of record, release, set-off, saved harmless, tender, and bringing money into court. Сп. 193.  
Art. 22.

§ 4. Pleadings in replevin, and in trespass.

§ 5. Pleadings in detail, enlarging on the fifteen first articles in this chapter, and each clause thereof, Ch. 174 to 192, both included, above.

*Chancery and equity.*

ART. 21. *Pleadings in chancery.* A mere sketch of these only will be given in this synopsis, because it is conceived there is no uniform system of chancery pleadings in the United States. As yet the English chancery system has been but partially adopted in them. In some States there is no general system of this kind; and in those in which there is a chancery system, it is materially affected and varied by State constitutions and statutes, and local opinions; and these being different in different States, in them pleadings &c. in chancery and equity, materially differ. Still, however, as some of the outlines of chancery pleadings may be useful here, they are briefly stated in these articles, 21 to 25.

In courts of chancery and equity, as in other courts, the pleadings are founded in strong sense, good logic, and sound legal notions. The material differences are these:—In these chancery courts, the proceedings are more on principles of equity, and according to conscience; and in them, the great object is to defeat fraud, to guard against accidents, and to enforce trusts. The parties often make their pleas, or state their facts, (not taken from public records,) on oath, less tied down by the rigid rules of law, and more at liberty to state their facts and cases, according to special circumstances, in each case, as will appear in the different pleas and answers, bills, supplemental bills &c.

§ 2. These chancery or equity courts in the United States, like the other courts here, are generally constituted by Federal or State constitutions, or statutes; and by these their powers and limits are generally defined; but subject to the variations, these make, in most cases, the pleadings and proceedings in them are according to the rules and practice in the English ancient court of chancery, and more modern court of equity; and especially as to the modes of proof, of trial, and relief. But chancery cannot overrule the maxims of the common law; nor in any instance make contracts for the parties; nor in any case construe their's otherwise than courts of law construe them.

ART. 22. *Pleadings in chancery continued.* The material parts, or heads of pleadings in chancery, are, 1. The pl'r's. bill, in which, as in a declaration, he briefly and clearly states

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Art. 22.



his case ; and only such parts of the deeds and writings as are material to it. This bill must include the proper parties, and when the plt. alleges a title to a thing, he must usually shew *how* his right exists. This bill has its formal parts, and is of different species ; as a bill of interpleader ; of discovery ; of *certiorari* to perpetuate evidence ; a bill supplemental ; of revivor ; a cross bill, of revivor and supplement ; of review ; to impeach a decree obtained by fraud ; a bill for executing a decree &c. according to the nature of the subject and stage of proceeding : 2. The process of *subpœna* to bring in the deft. This is served on him by being shewn to him, or left with him ; and if he do not obey, and appear on this, then, 3. An attachment goes against him. It also lies for any contempt, as in not answering ; or in giving an insufficient answer, as in contravening a decree of which he has knowledge : 4. If on this the deft. cannot be taken, a sequestration goes against his land and goods, binding them from being awarded. On this possession is taken, and perishable produce or articles may be sold ; and when the process is against a corporation, and it does not appear, the bill is taken *pro confesso*, when the deft. appears, he may demur, plead, disclaim, or answer. As the rules of evidence, in general, are the same in equity as in law, the pleadings which state facts in proper form, must bring them before the court, and prepare or arrange them for the purposes of being proved, pretty much in the one case as in the other ; hence, 5. The deft. may demur to the plt's. bill, and concisely point out such causes as shew the plt. ought not to have a decree. This demurrer, as in the other cases, only admits facts well pleaded, and the facts alone, without the conclusions of law : 6. The deft. may plead in abatement, that the court has not jurisdiction of the case ; to the disability of the plt., as that he is an alien enemy ; convicted of a capital crime ; outlawed in another cause &c. ; and the judgment, on disallowing his plea, is a *respondeas ouster* : 7. The deft's. plea in bar. This, as in a court of law, must be to one single, plain, and clear point. It must be a bar to the suit, and bring new matter before the court, or other matter than is stated in the bill. This plea must confess and avoid ; for if the deft. have two or more distinct matters, or deny the fact in the bill, he must answer. A plea, want of proper parties, is a bar to the whole bill, discovery and relief : so a plea, the act of limitations ; a former decree for the same thing : so another suit pending in the same or another court for the same cause : so a plea, that a bill requires an answer to matters which cannot be answered without subjecting the deft. to a penalty or forfeiture, or to the accusing himself : so he may plead, he is a purchaser, for a valuable consideration, and without notice ;

or that the title has been legally determined against the plt. : CH. 193. so it is a good plea, the deft. bought the bankrupt's goods *bonâ fide*, for a valuable consideration, before a commission issued, Art. 23. or notice of the bankruptcy : so to a bill of discovery, the deft. may plead, that what he knows is as counsel, or as an arbitrator &c. ; or that as mortgagee to protect his estate, he bought in an estate prior to the plt's. : 8. He may plead, that what is done is no waste, but an improvement : so many other pleas. This plea may be bad in part, and yet not bad in the whole, and so far as it does not contradict the bill, it must be taken to be true. This plea is put in by the deft. on oath generally. This plea must not be double, as that the bill subjects the deft. to statute penalties, and also to an impeachment ; but need not be on oath as to facts in it otherwise authenticated, as by records, deeds, &c.

ART. 23. *Pleadings in chancery continued.* So the deft's. plea must answer to the bill ; his answer, also, must be succinct and not scandalous. It must confess, avoid, deny, or traverse the material parts of the bill. The answer may be amended before issue joined. After answer, the deft. may move that the plt. be held to make his election to go on in law or equity with his cause ; for he ought not to proceed in both ways for the same cause ; but the recovering the land at law, and the profits in equity, are different causes ; and when parts of a suit are amended, as to these, it is pending only from the amendments. Where a plea in bar is allowed, or disallowed, it is peremptory : 2. When an answer is given, the plt. may make his exceptions to it ; but if there be a plea or demurrer to part, and an answer to part, he shall not take exceptions to the answer, till the plea or demurrer is agreed : 3. To the answer, the plt. may reply ; and his replication may be general or special : must be concise and not impertinent, or scandalous ; maintain his bill, and confess, avoid, deny, or traverse the answer. To a special replication the deft. may plead or demur. It must be formed to avoid the answer ; and not to go on to prove things confessed by it : 4. The deft. may rejoin and maintain his answer, and traverse, or confess, and avoid the replication : 5. The plt. may surrejoin, and the deft. rebut &c. : 6. The cause is heard on bill and answer, on depositions &c. : 7. An issue may be tried at law ; and has been often done : 8. The decree of the court, which briefly cites the substance of the proceedings, is declared : 9. When so, all parties and privies are bound by it : 10. The decree is executed, and the deft. is served with it, under the seal of the court ; and if he disobey it, all the processes for contempt shall issue against him successively ; and if he be in custody on any attachment, it must be returned before a sequestration issues

CH. 193. against his lands and goods ; and this may issue against him,  
 Art. 24. though his body is in custody ; and if he die, it may be continued against his heir.



ART. 24. *Pleadings in chancery continued.* In chancery suits, certain events may make collateral proceedings proper and necessary : 1. If pending the suit, the plt. or deft. die, his heir or executor shall have a bill of revivor against the other party, his heir, or executor, who has his interest : so if husband and wife be defts. and he dies, the plt. shall have this bill ; but if a death, or marriage, &c. make no alteration in the interest, there is no need of this bill ; as where joint obligees sue, and one dies : so one who is not privy, as an assignee or purchaser, or a devisee, who is as a purchaser, shall not have this bill of revivor. This bill must pursue the original bill : 2. After a bill is dismissed on a full hearing, there may be a bill of review for special reasons. This review is in the nature of a writ of error, and lies not but for errors apparent in the decree, or on affidavit of new matter coming to the party's knowledge, or first coming within his power to use it, after the making of the decree, but existing at the time of it. After the decree is enrolled, the cause can be reheard only by a bill of review. One's neglecting to have evidence, at the time of the trial, known to him, is no cause of such review, and on a review no matter shall be examined which might have been examined on the first bill ; and none but a privy to the first bill shall review ; nor shall there be a review against any but a privy to the first bill. There can be no review after a review. The party reviewing must give security for costs and damages : 3. The party, in certain cases, may have a supplementary bill, which is in the nature of a bill of review, grounded on new matter since the decree ; or on matter arising after the original bill is filed, and before the decree, or even before such filing.

ART. 25. *Pleadings in chancery continued.* In chancery proceedings the writ of injunction is of extensive use, to prevent the party's doing an injury to another, and after notice of the writ, it is a contempt of the court for the party enjoined to go on ; as 1. To proceed at law, after an injunction to stay proceedings ; and it may be by parol to one present in court : 2. To do waste after an injunction, or to indorse a gaming note or bill ; or to do certain printing after injunction, is a contempt : 3. This injunction may be to quit possession, or to forbid one remedy, where the party ought to pursue another : 4. It may issue to stay a trial ; and after a trial, a verdict, and after that a judgment, or after judgment, execution, and after this, monies levied &c. It is a contempt to disobey this writ, though irregularly obtained. But if one gets it, and after is

taken, and before notice given of it, to detain him, after notice, is no contempt. Equity does not aid against a statute, or a maxim in law. CH. 193.  
Art. 26.

But a complaint filed by the Attorney General, or other proper law officer, is properly an information *ex officio*. Its form, as that of the bill, has varied in different periods. However, the statement of the case, and the prayer of relief, have ever constituted the essence of each;—and, says Cooper, “one of the first principles of pleading is, that there is only occasion to state facts, which must be done for the purpose of informing the court, whose duty it is to declare the law arising on those facts, and of apprizing the opposite party what is meant to be proved, in order to give him an opportunity of answering it.”

Cooper's R.  
5.—See  
pleadings in  
equity, more  
at large, in  
Ch. 226. on  
certain sub-  
jects.

#### *Criminal cases.*

ART. 26. *Pleadings in criminal cases.* Parts in a criminal prosecution are, 1. The complaint: 2. Security for the peace: 3. Security for the good behaviour: 4. Courts of criminal jurisdiction: 5. Summary proceedings on attachment &c.: 6. Form of the complaint: 7. Oath of the complainant: 8. Warrant to arrest: 9. Arrest on view of the officer, or magistrate: 10. On view of an individual: 11. Arrest on warrant: 12. Bringing the offender before the court or magistrate, and his examination there: 13. Bail, or commitment: 14. Relief by *habeas corpus*: 15. Prosecution by indictment, and presentment: 16. By information: 17. Bringing in the offender, and outlawry: 18. Arraignment, and standing mute, or confession: 19. *Certiorari*: 20. His plea, and issue; his approvement: 21. Plea to the jurisdiction: 22. Plea in abatement: 23. Demurrer: 24. Special plea in bar: 25. General issue: 26. Challenge, and trial: 27. Evidence: 28. Verdict, general and special: 29. Clergy, or commutation thereof: 30. Motions in arrest of judgment; shewing a pardon, praying clergy; shewing some defects in the proceedings, jeofails, and amendments: 31. Judgment rendered: 32. Attainder: 33. Forfeiture: 34. Reprieve and pardon after judgment: 35. Reversal of judgment by error: 36. Execution: 37. Trial by impeachment. These are the heads of pleadings in criminal cases, stated in a summary manner. This does not shew the principles, however, on which these pleadings are founded, but hence these principles ought to be concisely stated, to complete this synopsis, and to make it an intelligible sketch, as well of the principles, as the parts of a system of pleadings.

ART. 27. *Complaint.* Whenever an offence is committed, any one knowing it, ought to complain to the proper magistrate. But by the 6th amendment to the constitution of the

**Cп. 193.** United States, it is declared, that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath, or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." This is fundamental law in every State, and the complainant, at his peril, must have good cause to suspect the person he accuses.

**Art. 29.**



**Ch. 220.**

**ART. 28.** Security of the peace, and good behaviour, see Ch. 150, a. 9; and courts. [See Courts, Ch. 187] In criminal proceedings there are no fictions of law; and the common law is a stranger to summary proceedings, except in cases of contempt of court; and no court can proceed in a summary way without previously notifying the accused, that he may be present, to be heard. Contempts are at common law, and by sundry statutes. 4 Bl. Com. 278, 285; Salk. 84; Stra. 185, 564. The process by attachment for them, is as old as the law itself. Where a contempt is committed in the face of the court, it may instantly order the offender to prison, at its discretion; if at a distance, it makes a rule, or orders an attachment, as the case is. And the sheriff may be ordered to take assistance, or aid, in the first instance. Is merely to bring the party into court, and when there, he may be ordered to put in bail, or be committed, for further inquiry, on interrogatories in the nature of an accusation, properly, and forthwith made. If he can clear himself, on oath, he is discharged; but if perjured, he may be prosecuted for the perjury. He cannot be held to answer, so as to accuse himself. Any affray near a court, though out of its view, is a contempt. 4 Bl. Com. 125, 126. So are reproachful words to a judge in court. Cro. Car. 503. So is injurious treatment to those under its immediate protection, as menacing words. So to advise a prisoner to stand mute; a witness not to testify, or for a grand juror to disclose to an offender the evidence against him; and by Massachusetts Colony law, 1641, one, guilty of contempt of court, might be fined, imprisoned, whipped, disfranchised, or banished. So merely serving process on one attending his cause at court, is a contempt of it. Andrews, 275. Motions and affidavits for attachments in civil causes, are proceedings on the civil side of the court, till the attachment issues, and entitled with the parties' names; but after issued, are on the criminal side, and hence the State is party, D. & E. 133, 153. Therefore all proceedings in cases of contempt of court, are, in the end, criminal, and an interesting part of criminal law.

See Warrant,  
Ch. 217.

**ART. 29.** *Warrant to arrest.* Arrests, see Ch. 172, a. 9, and form of the complaint, Ch. 217. This must be full and

explicit, as to the complainant, the accused, the court, the crime, the thing to be done, and the oath. In this stage of a criminal case, the most critical part is the proceedings on suspicion. Our statute, above stated, directs justices to proceed against persons suspected; and so it seems does the common law. For what suspicion may one arrest, and not be liable in false imprisonment, see that head, Ch. 172, a. 9, r. 5. The party may shew many causes of suspicion, to justify his arresting, and his plea will not be double. The law only permits, but does not command, a private person to arrest on suspicion; and he breaks doors at his peril. [To be considered at large.] Ch. 217.

CH. 193.

Art. 31.

ART. 30. *Commitment and bail.* What court or magistrate may commit, or bail, see Courts and Justices, Ch. 187, and Recognisance and Bail, Ch. 150. It is essential every commitment, (except on view,) be by warrant, or writing, under hand and seal of the magistrate; but a court commits by order, as there is a record of the commitment. It must, with certainty, describe the cause and offence, as for felony, for the death of A &c., in order the judges, on *habeas corpus*, may know the offence, and the gaol-keeper may make a correct register of his prisoners; the name and power of the justice; certain date of day and year; a fit conclusion, to wit: "to detain him till he be delivered by a due course of law," if committed by general authority; but if by special, this must be pursued, as till he account &c. 2 W. Bl. 805. Or if a statute direct one be committed for a precise time, as three months, so must the conclusion be, Gil. cases, 231, that the gaoler may know exactly how long to keep him, and when to discharge him. Every power given to commit must be strictly pursued; or the persons committing, are trespassers. And so this conclusion must be, if the statute be, that "he be committed, till he submit himself to be examined" &c. And a person may be committed for a crime by one magistrate, on affidavit made before another.

2 Hale's P.C.  
122, 123, 124.  
—3 Bl. Com.  
133.—4 Bl.  
Com. 297.—  
4 Com. D.  
375.

Ch. 220.

1 Esp. 413.

1 Salk 351.  
—4 Cranch,  
75, 136.

ART. 31. *Relief on habeas corpus.* Where this writ lies in Massachusetts &c., see False Imprisonment, Ch. 172, a. 9. It is grounded on our constitutions, and several statutes. "Cannot be suspended, unless in cases of rebellion, or invasion, or the public safety require it." Is the most important writ in our laws. When directed, it expresses the object, as to bring the party in to answer, or to prosecute his suit, or to give evidence, or to do and receive what the court shall order. He that moves for it, must shew he has some probable cause to be delivered; and it is the right, as well as the duty of the government, to inquire, why any citizen is restrained of his liberty.

CH. 193.

Art. 33.

**ART. 32. Indictment.** This will have a separate consideration. Here it need only be observed, that every breach of the peace, and public offence, is indictable, but not private wrongs. So disobedience to a public statute, is indictable at common law. So is obstructing its execution. But none lies for a mere statute offence, where any other remedy is given by the act. If one be cheated by a mere lie, no indictment lies. Every indictment is several, as well as joint. None of the acts of jeofails extend to indictments. By the Federal constitution, "no person shall be held to answer for any capital or other infamous crime, unless on a presentment, or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service in a time of war, or public danger;" and this principle is law in the several States. The grand jury can inquire only of facts in the county or district. To find a bill, twelve of them, at least, must agree. To proceed by indictment in criminal cases, is most conformable to *magna charta*, and the spirit of our laws. They may find part of a bill true; or a bill for murder, true for manslaughter. An indictment is a plain statement of facts, and regularly is not vitiated by bad grammar. Usual abbreviations are allowable. "An indictment grounded on an offence made by statute, must, by express words, bring the offence within the substantial description made in the statute; and those circumstances mentioned in the statute, to make up the offence, shall not be supposed by the general conclusion, *contra formam statuti*; nor will any *periphrasis*, intendment, or conclusion, make good an indictment, which does not bring the offence within all the material words of the statute." If an offence be created by statute, no judgment can be given on an indictment that does not conclude, *against the form of the statute*. Private statutes must be recited. Not so, if general.

3 Enc. Abr.  
113.—2 Haw.  
c. 34.—2  
Hale's P. C.  
192, 193, 336.

**ART. 33. Informations and inquisitions &c.** These, in the nature of *quo warrantos*, have been already considered. Informations are sometimes filed on penal statutes; and when the informer has a part of the penalty, are a sort of *qui tam* action, or prosecution. But informations of all kinds are confined by our constitutional law, to mere misdemeanors; and they cannot be used in the United States, when capital or infamous punishments are inflicted; as then there must be an indictment by a grand jury. An information lies against the members of a corporation for a false return to a *mandamus*: Two cannot be exhibited for the same offence against the same person; and if two persons, exhibit the same day against the same person, informations for the same offence, both are barred. Informations, mere inquests of office, have been considered.

In an information, the Attorney General "gives the court to understand and be informed of" the matter in question, on which the party is put to answer, and a trial is had as in suits between party and party, or citizen and citizen. It lies for a forfeiture to the State, as well as for a breach of a penal statute; so it has been brought against a town for not having a settled minister for two years &c.; there is also an information *in rem*, when goods are supposed to become the property of the state, and no one appears to claim them. It is often provided in the statutes of the United States, and of each State, that a penalty be limited to be recovered by action of debt, bill, plaint, or information; how limited by Massachusetts act of June 19, 1788. It is a general, though not a universal rule, that the court will not grant an information for a private libel, charging a particular offence, unless the prosecutor will deny the charge on oath. Dougl. 383, *Rex v. Miles*.

CH. 193.  
Art. 35.

3 Bl. Com.  
261.  
1799.

ART. 34. *Offender brought in, and outlawry.*

§ 1. Where an indictment is found, and he is not in custody, process, by *capias*, must issue to bring him in; and this now is usual in the first instance. The indictment cannot be tried unless the accused personally appears, except by consent in small offences, according to the rules of equity in all cases, and by the express provisions of the 28 of E. III. c. 3, in capital cases.

§ 2. Whenever a party obstructs an arrest on criminal process, he becomes *particeps criminis*; that is, accessory in felony, and principal in treason. By this act, it is enacted, that if any person, knowingly and wilfully, obstruct any Federal officer in executing any legal process, assault, beat, or wound him, he is punishable by fine and imprisonment. This was enacted into Federal statute law, what has ever been common law in each State.

4 Bl. Com.  
413.—25 E.  
c. 14.  
Act of Cong.  
April 30,  
1790, sec. 22.

§ 3. But if the offender absconds, he may, in many cases, be outlawed. At common law there was no process of outlawry, but in cases of felony. Process of outlawry in personal actions is wholly by statute, there is no provision for an outlawry in the laws of the United States; and though in Massachusetts there has been a statute near forty years, directing the process in cases of outlawry, it is believed there never has been but one outlawry had upon it. See Outlawry, Ch. 220.

ART. 35. *Arraignment, standing mute, confession, approving.*

§ 1. In all cases of treason and felony, the deft. must appear in person; as soon as he is in court, he is arraigned or put to the bar to plead by his proper name; and in capital cases he must in some way acknowledge he is the person charged; and must be arraigned without irons, unless there be evident danger of escaping. If, when the indictment is read

2 Hal. P. C.  
216.—4 Bl.  
Com. 317.

CH. 193. to him, and he is asked if he is guilty, or not guilty, he stands  
 Art. 36. mute, different courses are taken according to different laws.

§ 2. This act provides, if in treason, he peremptorily challenges above thirty-five jurors, or in case of any other offence, he stands mute, or will not answer to the indictment, or challenges peremptorily above twenty jurors, the court shall proceed as if he pleaded not guilty. The same is the practice in Massachusetts and other States. Rarely in the United States has a jury been impannelled to inquire if the accused stood mute obstinately, or from the visitation of God. By the severity of the ancient common law, standing mute in treason, felony, or trespasses, amounted to a confession of the charge. Upon a simple and plain confession of the indictment, the court has only to award judgment. But it is with reluctance it receives and records such a confession, out of tenderness to the life of the subject, and in capital cases will usually advise the prisoner to retract such confession, and to plead to the indictment.

§ 3. *Approvement* is not now practised as it was anciently; by the old law none could be an *approver* but one indicted for the *same felony*, and this in open court on oath, and entirely at the discretion of the court; this doctrine of *approving* has never been practised in Massachusetts; nor can it be now in the United States, for a part of it was to proceed against the appellee on the appeal, and without indictment. This would be against our constitutions; our practice is to allow one to bring out his partners in guilt upon an understanding he shall not himself be punished, or punished more lightly; and formal approvement is not known in our practice.

ART. 36. *Pleas in criminal cases.*

§ 1. These are to the jurisdiction in abatement and in bar; the deft. demurs, puts in a special plea in bar, or pleads the general issue. We have no plea of *sanctuary*. The plea to the jurisdiction is where an indictment is taken before court that hath not jurisdiction of the offence; as if a man be indicted for *piracy* on the high seas, in a State court; or in a Federal court, for a crime against a State statute. In this case, the party charged may except to the jurisdiction of the court; and without answering at all to the crime alleged, the party charged may pray *oyer* of the indictment, and plead in abatement any defect in it. It is rare to except to it before trial, because the exception after, and in arrest of judgment, is usually more to his advantage; for if it prevail in abatement, the court can direct a new bill to be sent to the grand jury. *Misnomer* is the principal plea in abatement, and in all pleas in abatement, he that takes advantage of a flaw, must show how it may be amended. The court will not, on motion, quash an indictment for a cheat, though it may be bad on demurrer. In

Act of Cong.  
 April 30,  
 1790, sec. 30.

all cases of pleading a *misnomer*, the party must plead over to the felony. The general issue of *not guilty*, is the usual plea; and the special pleas in bar are of four kinds: 1. Former acquittal: 2. Former conviction: 3. Former attainder: and, 4. Pardon. There may be a demurrer to an indictment, when the facts, as alleged, are allowed to be true, and the prisoner may join issue on some point of law in the indictment; as if one be indicted for stealing a *greyhound*, he may demur to the indictment, confess the act of taking, but say, it is no felony; because there is no valuable property in this kind of animal. But demurrers to indictments are but seldom used, as the deft. may have the same advantage in arrest of judgment, and with much less hazard to the deft.

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Art 36.

§ 2. These four pleas are, and have been but very rarely pleaded in the United States. The first of these four pleas, *autrefois acquit*, is founded on the maxim of the common law, that no man is to be brought into jeopardy of his life more than once for the same offence; but his life must be once really in jeopardy; hence, if indicted, and discharged, or convicted, and judgment arrested for the insufficiency of the indictment, he may be indicted again; so if reversed, on error; for the first being erroneous, he never was in jeopardy thereby of his life; 4 Bl. Com. 386. When *autrefois acquit* is pleaded, it imports an effectual acquittal from the crime, and this must be by verdict on a *good indictment*. So as to *autrefois convict*, "if A be indicted, and convicted of felony, but hath neither judgment of death nor hath prayed his clergy, this is no bar of a new indictment for the same offence, if the first were *insufficient*;" "and it seems, though it were sufficient, yet it is no bar without judgment or clergy." But *quare*, for where the deft. has once stood trial for his life on a *good indictment*, his life has been clearly once in jeopardy, though no clergy or judgment.

4 Bl. Com.  
329.

4 Co. 45, 46.  
—1 Johns. R.  
66.—Gillb.  
cases, 229.

2 Hal. P. C.  
252 —1 Haw.  
513.

*Autrefois attain* of the same felony, though on an insufficient indictment, was, at common law, a bar to another indictment for the same offence, and so remains; but otherwise, if attainted by outlawry, and he reverse that; one attainted for felony is incapable to answer for any other felony, and shall not be indicted for it, but if pardoned the first felony and attainder, then he may be put to answer the new felony; for while attainted, he is dead in law by the first attainder. "If A commits several felonies, and be *convict* for one of them, but no judgment of death, so no attainder, or no clergy given him, he may be indicted for all those former felonies; so if attainted, and judgment be reversed, or he is pardoned, he may be indicted for an after felony. And attainder in *felony* is no bar to an indictment for *treason*. One attainted of robbery shall be

4 Bl. Com.  
530 —2  
Hale's P. C.  
251, 252.

253.  
4 Bl. Com.  
330.

2 Hale's P. C.  
253.

4 Bl. Com.  
330, 331.

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Art. 36.

4 Bl. Com.  
331.

4 Bl. Com.  
331.

2 Hale's P. C.  
392.

Co. Lit. 390.  
-1 Wils 312.

2 Bl. Com.  
256.—Co.  
Lit. 390, 391.

4 Bl. Com.  
295.

Bl. Com. 363.

1 Hale's P. C.  
326.—4 Bl.  
Com.—7  
Mod. 153.

2 Hale's P.  
C 413.—4  
Bl. Com. 387.

tried for murder, where there are accessaries; 331. Rules in these three cases: 1. The party who pleads the record, must plead it specially, stating it: 2. He must show the record in the form, and authenticated as the law requires: 3. He must aver he is the same person; that it is the same offence: 4. No issue on the plea *nul tiel record*; as it is pleaded in court, but the Attorney General may have *oyer*; the plea *auterfoit attain* is never good but where a second trial would be superfluous: 5. In all these pleas of *auterfoit acquit*, *convict*, and *attain*, of the same felony, the conclusion of the plea is, "and this he is ready to verify, wherefore he prays judgment that he be here dismissed by the court of the premises;" and then, usually pleads over to the felony, *not guilty*, for if his plea be found against him, he shall be tried: 6. In these pleas, his averments are issuable: 7. And issue joined on them, is tried by jury.

*Attainder*. A man is *convict* by verdict, but not *attainted* before judgment; by that he is *attainted*, and then is dead in law. One *attainted*, may be sued as to the effects of it in regard to property. The English law does not apply in the United States. See Estates by Forfeiture, Ch. 136. *Attainder* corrupts the blood on *feudal* principles; therefore *attainder* or judgment of death for heresy, or piracy, by course of the civil law, corrupts not the blood; and this is the case in our law, for even in treason, the traitor is inherited by his heirs.

*Pardon* is another special plea in bar. Pardon as to testimony, see Evidence. Power to pardon in the United States, plea, a pardon in defamation, Ch. 63, a. 8. The effect of a pardon is to make the offender a new man, but restores not the blood once corrupted. By pleading a *pardon* in arrest of judgment, there is an advantage, as it stops the corruption of blood, by preventing the *attainder*. In pleading a pardon, the effect or extent of it is to be considered; as if A give B a mortal wound, and then is pardoned *all misdemeanours*, and then B dies of the stroke within the year and day, A is pardoned as to this felony: may be on condition by the common law: cannot affect private rights: as where one was bound to repair a bridge, and the king pardoned the defect; he was discharged as to the *fine*, but not as to the *duty to repair*, as in that the people had an interest. So in a recognisance to keep the peace. 11 Co. 30.

Reprieves are common also in criminal cases. Judges may grant them before judgment, when not satisfied with the verdict, evidence, or indictment. And after judgment, as where the offender becomes insane, or a woman is found to be quick with child. No pardon can have operation, where private justice is principally concerned.

**ART. 37. Challenges.** These are as the jurors are severally called to be sworn. Are to the array, or whole panel, for some fault in the returning officer; or in the drawing the jury in our practice, as where the the jury is not returned or drawn, elected or formed, according to law; and hence there is no legal jury. Challenges to the array, are not common in our practice, on the officer's account; because most of our jurors are drawn &c. But objections in the nature of challenges, may be frequent, on account of the illegally assembling a jury; as for defects in drawing &c. the jurors. Challenges to the polls, are exceptions to particular jurors. These are of four kinds: 1. As not legally drawn by the town &c., or not legally returned by the constable &c.: 2. For personal defects, if an alien or outlaw, or as want of the legal estate, or age: 3. For bias or partiality, "as if the juror be akin to either party within the ninth degree &c.": 4. For some crime, as felony, conspiracy, &c. The same challenges may be made to *talesmen*. If a man have the use of a freehold to the legal amount, it is not material whether in his own, or his wife's right, on condition or not, of inheritance, or for the life of himself or another. In treason, the deft. may peremptorily challenge thirty-five jurors;—in other capital cases twenty, and give no reason. The true question is, does the juror "stand indifferent between the parties to the issue."

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Art. 38.

See Trial.

**ART. 38. Trial.** Formerly there were many modes of trial, and some very ridiculous ones, introduced by the superstition of the times, and which are now out of use. By the constitution of the United States, "the trial of all crimes, except in cases of impeachment, shall be by jury." This is law in the several States, established generally by the State constitutions, and very ancient usage. If a jury cannot agree, one may be withdrawn, the jury discharged, and the cause committed to another jury. The jury may return into court to propound questions to the court. The jury must be kept together, and cannot eat or drink till they are agreed, but by consent and leave of the court. They may correct their verdict before recorded; or by advice of the court go out together again. Their verdict must be given in open court, and they now only answer to the point of guilty or not guilty. They may find a special verdict; or find the deft. guilty of part, and not guilty of the rest. So they may find him guilty of the fact, and vary in the manner. If indicted for burglary, they may find him guilty of simple felony;—if of murder, guilty of manslaughter. Trial by impeachment, rests on the several constitutions; the charge in which must be framed on the material facts and law of the case. The plea is, usually, not guilty. The House of Representatives impeaches. The

CH. 193. Senate is the court to hear and decide on oath. Lies against  
 Art. 40. any officer of the Union or State, for misconduct, and mal-  
 ~~~~~ administration in office ; but judgment can be only to remove  
 from office, and disqualification to hold offices.

ART. 39. *Evidence and verdict.* Evidence in criminal, as  
 in civil causes, is admitted or rejected, on all the various  
 grounds of evidence stated in chapters 80 to 99. And verdicts  
 in criminal cases, as in civil, are good and allowed, or set  
 aside, for a multitude of reasons, which appear in detail in  
 preceding chapters. If fairly found by the jury, in substance,  
 the court will put them into form.

Act of Con-  
 gress, April  
 30, 1790.

ART. 40. *Benefit of clergy*,—now but little in use,—and  
*conviction.* Conviction is on confession, or verdict. The  
 benefit of clergy : this is yet an article of some little im-  
 portance in Massachusetts, and some other States ; but of  
 none in the United States courts ; as by this act it is provided,  
 “that the benefit of clergy shall not be used or allowed upon  
 conviction of any crime, for which, by any statute of the  
 United States, the punishment is, or shall be, declared to be  
 death.”

Mass. act,  
 March 11,  
 1785.

But this act only commuted this benefit of clergy, disallow-  
 ed the plea of, and enacted, if any person be convicted of a  
 crime, where he might, by the then laws, have pleaded it, in-  
 stead of that plea, the punishment of death is commuted, for  
 sitting on the gallows, fine, whipping, and bonds for the good  
 behaviour, or one or more of them. Hence still arises the  
 question, what crime in this State, March 11, 1785, was pun-  
 ishable with death, and benefit of clergy allowed. This benefit  
 was never allowed but in petit treason and felonies ; but in  
 our treason act of 1777, benefit of clergy was denied. The  
 crime of petit treason does not exist here. Then the inquiry  
 is narrowed to this,—what felonies were punishable capitally,  
 and clergy allowed here, March 11, 1785. There were but  
 six felonies then so punished, to wit : murder, rape, burglary,  
 arson, sodomy, and robbery ; and accessaries in them before  
 the fact, in all, twelve cases. In how many of these twelve  
 cases was benefit of clergy allowed ; or the same thing, in  
 how many taken away ? It was taken away by 25 H. VIII.  
 c. 6, and 15 Eliz. c. 17, in sodomy : by 4 & 5 P. & M. c. 4,  
 from accessaries before the fact in cases of murder, arson,  
 and robbery : by 18 El. c. 7, from him who committed burg-  
 lary and rape : by 23 H. VIII. c. 1 ; 32 H. VIII. c. 3 ; 1  
 E. VI. c. 12 ; 5 E. VI. c. 9, from him who committed mur-  
 der, or robbery, and the accessaries thereto before the fact :  
 and by 4 H. VII. c. 11, always, after allowed once. Hence  
 clergy was taken away in the cases of murder, rape, burglary,  
 arson, sodomy, and 6th, robbery, all the capital crimes in

Allowed in  
 Virginia, A.  
 D. 1795, in  
 the case of  
 horse steal-  
 ing, Virg.  
 Cases, 114,  
 115—Not in  
 Kentucky ;  
 Toul. Ken.  
 Laws, 350 :  
 but where  
 once allow-  
 ed, punish-  
 ment in the  
 penitentiary  
 is substituted.

Massachusetts. Therefore, no case was left for commutation at that time. But it is a principle of law, where a statute makes a new capital felony, clergy is allowed. We have no such case, unless by construction in re-enacting the crimes of murder, in March 1805, and rape, March 1806. But it is not understood that the person, who commits either of these crimes, is entitled to his benefit of clergy, or the commutation.

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ART. 44.

By 25 E. III. c. 4, the person, secular or religious, convicted before the secular justices, for any treason or felony, (except as to the king,) were to enjoy the privilege of holy church, and be forthwith "delivered to the ordinaries demanding them;" whereupon the bishops were to punish them. 1 Bl. Com. 365; 1 Bl. Com. Chris. notes, 92, 119; 2 Hale's P. C. 330, 335. But by 18 El. c. 7, every one allowed his or her clergy, must be enlarged, without being delivered to the ordinary. And by 4 H. VII. c. 13, he that is allowed his clergy, must be marked openly before the judge. Massachusetts legislature has no power to commute the punishment fixed by law, after sentence has been given. 14 Mass. R. 472.

ART. 41. *Arrest of judgment.* Motions to this purpose are numerous. See Ch. 146. Before judgment, and after verdict, the deft. may offer any exceptions to the indictment in arrest of judgment. As for want of sufficient certainty in setting forth either the person, the time, the place, or offence, and if the objection be valid, the whole proceedings may be set aside, and the party may be again indicted. And as none of the statutes of jeofails, for amendments of error, extend to indictments on proceedings in criminal cases, a defective indictment is not aided by verdict in a criminal case.

ART. 42. *Judgment.* In every case this is according to the punishment ordained by law, either Federal or State, common or statute law.

ART. 43. *Forfeitures and penalties.* These also are according to the numerous laws enacting them for offences. See Forfeitures, Ch. 136, and Penalties, Ch. 148, where penalties and forfeitures are considered at large.

ART. 44. *Judgment reversed on error &c.* A judgment may be falsified, reversed, or avoided, without a writ or error, for matters *dehors* the record; that is, not apparent on the face of it, so that they cannot be assigned for error in the superior court, which can only judge from what appears on the record itself. If a judgment be given by persons who had no commission to give judgment, it is void, and may be falsified, by shewing the special matter, and without a writ of error. Where the alienor is attainted of treason or felony,

CH. 194. the alienee, without a writ of error, may falsify any point not expressly found by the jury. So judgments in criminal cases, as in civil, may be reversed by writs of error, for notorious mistakes, irregularities, want of form, or omissions in any part of the proceedings recorded. See Error, Ch. 137.

Art. 45.

ART. 45. *Executions.* By these, judgments are carried into effect according to the terms and intent of them; and the officer must do execution in the very manner pointed out in the judgment.

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## CHAPTER CXCV.

### PLEADINGS—PRACTICE.

See Ch. 226,  
a. 15, Prac-  
tice in Chan-  
cery.

*Practice.* Before I proceed to consider crimes, and some material parts of pleadings, in criminal cases, in detail, it may be proper and useful to insert three chapters respecting practice and costs, statutes which naturally involve in them both civil and criminal cases.

In ancient times practice does not seem to have been made a distinct branch, even in tables or indexes of law; and there seems to have been a reason for it; for practice in reality involves matters appertaining to almost every branch in pleadings, and to all judicial proceedings; and therefore it will be found that the various matters contained under the modern head of practice, are, for the most part, better and more intelligibly divided and placed under their appropriate heads. For instance, some making *bail* a distinct branch, and properly, yet have some cases relating to bail under the head of *practice*; this was not the ancient method; but by that, cases relating to bail, were arranged under that head; and there is the place where we naturally look for them; so as to continuances, plea issuable, &c. Still this modern head, *practice*, is perhaps beneficially added, if properly limited to some cases of mere practice, which cannot well be arranged under the more certain, specific, and appropriate heads. In this chapter, cases of practice will be collected from three sources: 1. Proceedings in the Federal courts: 2. From proceedings in State courts: 3. From such proceedings in the English courts as apply here. The rules and cases collected from these sources will be arranged in the following articles.

ART. 1. *As to time to plead, and effects of delay.*

CH. 194.

Art. 1.

§ 1. If a party plead at the Common Pleas with reservation, he must file his new plea at the first term of the Supreme Judicial Court, as many inconveniences would follow from a different practice; and if to plead *anew*, he must plead to the country. 6 Mass. R. 459, *Moody & al. v. Blake*; 1 Caines' R. 21, 113.

3 Mass. R.  
299, *Tyng v.*  
*Prentice, exr.*

§ 2. The appellant neglected, by accident, to enter his appeal from the Common Pleas in proper time; that is, the term to which it was made; he was allowed to enter it the next term, as of that term, the appellee consenting, and the bail not being prejudiced, nor subsequent attachments affected thereby.

4 Mass. R.  
645, *York v.*  
*Noyes*.—2  
Caines' R.  
251.—3  
Caines' R.  
256.

§ 3. Petition for a review, and the petitioner neglected to serve the first order of notice, and before a second order would be returnable, the year would expire within which the execution must issue; the court refused to stay execution; writ of error dismissed, neither party appearing.

7 Mass. R.  
63, *Nichols v.*  
*Foster.*

§ 4. This was a real action, entered at the last term of the court, when the deft. appeared, and imparled to this term, to vouch one to warranty; the *summons ad warrantizandum* was duly served and returned; vouchee defaulted &c.; deft., second day of the term, moved for leave to plead double; allowed, as in season, on the true construction of the rule.

5 Cranch,  
289.

§ 5. Batts, a negro, was indicted for murder; he pleaded guilty; the court would not direct an immediate entry of this plea; but gave a reasonable time to him to consider of his plea, and that he might retract it if he thought proper.

1 Mass. R.  
94, *Dudley v.*  
*Sumner.*

§ 6. Braley was indicted for murder; on being asked if *guilty* &c., said he did not know what to say; on much evidence of insanity, a jury was impanelled, and sworn, &c., which found he neglected to plead by the act of God. The court did not proceed then to try him; but he was remanded to gaol.

1 Mass. R.  
95, *Common-*  
*wealth v.*  
*Batts.*

§ 7. *Time to put in bail, how enlarged.* If four days be allowed for it, it is exclusive of the return day; and if the last day be Sunday, then the whole of Monday; for then Sunday is not one of the four days. If a rule expire on Sunday, party has all the next day. A rule of practice that requires notice to the deft. after a delay, does not apply when it is at his request; and on a rule to plead, reply &c. in four days; one on the morning of the 5th may be rejected.

1 Mass. R.  
103, *Com-*  
*monwealth v.*  
*Braley.*

§ 8. The plt. did not declare in the time the statute required. Held, the deft. cannot enter judgment of *non pros.* without having first entered a rule on the plt. to declare, and served him with a notice of the rule.

Lofft, 190.—2  
Stra. 782,  
*Studley v.*  
*Start*.—6  
Johns. R.  
326.—3 D. &  
E. 530.—4 D.  
& E. 195.

§ 9. A writ of error was brought, and judgment reversed; deft. had not regular notice, in writing, of this writ &c., but

2 Johns. Cas.  
293, *Gilbert*  
*v. Field.*

8 Johns. R.  
257, *Clement*  
*v. Crossman.*

CH. 194.  
Art. 2.



was informed and sufficiently apprised of its pendency, to have pleaded in time; and of the reversal, by default, in season to have moved the court at a former term to set it aside. Held, he was guilty of *laches*, and that judgment ought not to be set aside after a term had intervened. In this case, the deft. in error, was held to *reasonable* notice, when he had not the notice he was entitled to by the rules of practice established. 2 Caines' R. 95, 256; 3 Caines' R. 126.

1 Johns. Cas. 245, Case v. Shephard, and 310.

§ 10. After verdict for one, he may proceed to enter up judgment, though a case be stated, unless a judge's order be obtained to stay the proceedings; and if he refuse, the party dissatisfied may apply to the court the next term for that purpose; how enlarges the time.

6 Johns. R. 127, Conklin v. Havens.

§ 11. When the plt. files common bail for the deft., according to the statute, the declaration may be filed *de bene esse* at any time within forty days; and when may the declaration be filed *de bene esse*?

12 Mass. R. 47, Haskell v. Whitney.

§ 12. Parties to an action in court enter into a rule of court, submitting the action, and all demands, to referees, with an agreement they may proceed *ex parte*; and judgment on their report &c.; neither party can rescind such rule, nor can the plt. discontinue pending the rule.

ART. 2. *The manner of arguing and hearing the causes &c.*

7 Mass. R. 205, Austin v. Wilson & al.

§ 1. This was an action of covenant against the defts., as heirs of the covenantors in a certain conveyance of land; the parties agreed to certain facts, and if the court should be of opinion the defts. were all liable, as heirs of the original grantors, the defts. agreed to try the cause on the plea they had nothing by descent, or to be defaulted, and if defaulted, referees to ascertain the damages. The court refused to hear the cause, observing the submission was merely of a *preliminary* question only.

8 Mass. R. 286, Tucker's case.

§ 2. John Tucker was returned as a grand-juror from the town of Gloucester. Held, the court would not reject him, because he had been the prosecutor of a person whose case might come before the grand-jury this term; which person was accused of murder.

1 Mass. R. 335.

§ 3. On the question of the *testator's sanity*, the party for establishing the will, opens and closes; he has the *affirmative*.

2 Dallas, 125.

§ 4. Where proof of the issue lies on the deft. he shall open the cause; as he has the affirmative. *Leech v. Arncliffe*.

3 Johns. R. 642, Main v. Newson.

§ 5. In every cause made for argument, the party to open must first deliver to the other party, and to the court, the points he intends to insist on.

1 Johns. R. 275; Anon.

§ 6. The judge refused a certificate to stay proceedings in a cause after verdict; there was an appeal from his opinion. Held, the appellant might deliver to the court the points and authorities on which he relied, together with the case.

§ 7. When the opening counsel in a cause is about to open it, he must furnish the other party with the points he means to rely on, in support of his motion. 1 Johns. R. 251, 266, Schmidt v. United Insurance Company. CH. 194. Art. 2.

§ 8. A point reserved by the judge at *nisi prius*, is like a special verdict; and the plt. must prepare the case, and open the argument: must mean where the plt. still has the affirmative. 1 Johns. Ca. 393, Percival v. Jones.

§ 9. The same principles hold where a verdict is taken, subject to the opinion of the court, on a case stated; the plt. opens the argument, except where the deft. has the affirmative. 2 Johns. Ca. 219, Jackson v. Murray.

§ 10. In a case stated, for the opinion of the court, the facts proved at the trial must be stated, and not the evidence of facts only. 2 Wils. 163, Palmer v. Johnson.

§ 11. If the deft. plead payment, and gives notice of *set-off* in general terms, for goods sold and delivered, money paid, &c. the plt. has a right to require him to specify and to deliver an account of the *particulars* of the *set-off*. So where the *particulars* of the plt.'s demand are not stated in his declaration, the deft. may require him to deliver an account of *particulars*; either party may notice a cause for argument. Coleman, 129. 3 Johns. R. 248, Mercer v. Layre. Deft. cannot try a cause by proviso, without a rule and usual notice. 2 Caines' R. 386.

§ 12. *Assumpsit* against *forty-six* defts. and four counts; the court ordered the word *defts.* to be used for, or instead of, *their names*. Counsel not being prepared, is no cause for the court's not proceeding. New R. 209, Meeks v. Oxland. 3 Burr. 1319.

§ 13. Special pleas must be signed by counsel. 5 Johns. R. 235, Ch. 180, a. 3, s. 3. DuBois v. Phillips.

§ 14. In arguing on a petition to the Court of Errors to have proceedings stayed until a new assignee of a bankrupt is made a party to the appeal, the counsel in support of the motion are first to be heard: was a chancery cause. 2 Johns. R. 485, 489, Sands & al. v. Codwise & al. in error.

§ 15. Where a deft. is brought up for sentence on an indictment or information, *after verdict*, his affidavit shall be first read, then those of the prosecution; after which the deft.'s counsel is first heard, and lastly the counsel for the prosecution. 2 D. & E. 683, Rex v. Bunts.

§ 16. But where a deft. is brought up for sentence *after judgment by default*, the prosecutor's affidavit shall be first read; then deft.'s; after which the counsel for the prosecution shall be heard; and lastly, the deft.'s counsel. But if no affidavits be produced, the deft.'s counsel shall be first heard, and then the counsel for the prosecution. 2 D. & E. 686.

§ 17. Deft. may be allowed to withdraw the general issue and plead it again with notice of *set-off*, on motion made in due time. 2 D. & E. 684.

§ 18. It is a rule that matter of substance must be pleaded; but matter of inducement only may be given in evidence on the general issue. 4 Burr. 2464, Silby v. Cumming.

## CH. 194.

## Art. 2.

1 Johns. R.  
192, *Sleight v.*  
*Rhinelanders.*

3 Johns. R.  
145, *Dubois*  
*Roosa.*

2 Dallas, 189.

1 Johns. R.  
425, *Malcolm*  
*v. Bayard.*

3 Johns. R.  
425, *Little-*  
*field v. Story.*  
2 Cranch, 10.  
—2 Cranch,  
349.

3 Cran. 93,  
*Peyton v.*  
*Brooks.*

3 Cranch,  
249, *Monta-*  
*let v. Murray.*

6 Cranch,  
281, *Hudson*  
*v. Guestier.*

6 Cranch,  
187, *Marine*  
*Ins. Co. v.*  
*Young.*

6 Cranch,  
207, *Marine*  
*Ins. Co. v.*  
*Hodgson.*—  
6 Cran 280,  
*U. States v.*  
*Evans.*

§ 19. Where a special verdict or a *bill of exceptions* is taken, and a case also made; held, the party must make his election to proceed on the one or the other, and will not be allowed to argue both. Is it not a novel practice that allows both to exist together?

§ 20. Rules by consent, or agreements between the parties or their attorneys, are not binding, unless entered in the book of common rules, or reduced to writing by them, or by some person authorised for that purpose; and 3 Caines' R. 129.

§ 21. The deft. on a submission to an indictment, may be heard without oath, but not on his own affidavit, in mitigation of the fine. *Respublica v. Askew.*

§ 22. Either party may bring on the argument of a case, and, if not made up ready to be delivered, by the party whose right it is to make it up, when the cause is moved by the opposite party, he may have judgment by default.

23. The party demurring, must make up the paper book, and bring on the cause for argument.

§ 24. A statement of the case must be furnished the court by the counsel on each side of the cause; and Rules of Court, 17.

§ 25. The Supreme Court of the United States requires a statement of the point of a case, before argued. 2 Cranch, 10, 349, *Reily v. Lamar & al.*

§ 26. And if statements of the case are not furnished according to the rule of the court on that subject, the cause will be dismissed or continued.

§ 27. If the plt. in error do not appear to manage his cause, the deft. may have him called, and the writ of error dismissed, with costs; or the deft. may open the record, and proceed for an affirmation of the judgment.

§ 28. When a judgment is reversed in favour of the deft., on a bill of exceptions, a new trial must be awarded by the court below; of course the cause must be remanded to that court, there to be argued and tried.

§ 29. The court is not bound to give a construction of written depositions to the jury, which are read as evidence in the trial; and it is no ground of reversal, that the court below refused a new trial on the deft's. motion, made on the ground, that the verdict was contrary to evidence.

§ 30. Our Federal courts do not admit, in practice, depositions in evidence, contained in the proceedings of a foreign court of admiralty, that condemns the vessel, when offered to be used in a suit on a policy of insurance, on such vessel; and it is no cause of error, in a lower court, to refuse leave to amend, or to grant a new trial, or to continue a cause, or to reinstate one nonsuited. Other cases of proceedings set

aside for irregularities. Colman, 45, 46 ; 1 Caines' R. 134, CH. 194. 495 ; 2 Do. 45 ; 3 Do. 107.

§ 31. Error to the Circuit Court of the District of Columbia, held, 1, the nominal plt. (the contractee's name used, as plt. for the benefit of his supposed assignee, one Prior) may dismiss the action, brought in the contractee's name, by a creditor having no assignment of the contract: 2. And the action having been duly dismissed, it is no error in the court below, to refuse to reinstate it. It is in the court's discretion. The judgment affirmed. The court will not compel a cause to be heard, if the citation be not served thirty days before the first day of the term.

Art. 3.

7 Cranch, 152 156, Welsh v. Mandeville.

§ 32. Error to the Circuit Court, Columbia, sitting at Alexandria, proceeding by Virginia laws: held, 1. A plt. may before verdict, discontinue a count in his declaration, and waive the issue joined. Four counts, 1. On a written contract: other three, different *assumpsits*. *Oyer* craved of the written contract, stated in the first count, and several pleas filed to that; without repeating the *oyer*, filed pleas to the other counts: held, 2. *Oyer* of a deed in the first count, does not make that deed part of the record, so as to apply it to the other counts, grounded on other contracts than the first count is; but does make it a part of the record, as to the deft's. subsequent pleas to the first count. *Oyer* of one count is not *oyer* of another. Judges divided in opinion below.

5 Cranch, 321.—7 Cranch, 176, 194, Hughes v. Moore.

2 Cranch, 33, Ogle v. Lee.

ART. 3. *Proceedings irregular and set aside.*

§ 1. Where a judge at *nisi prius* nonsuits the plt. by mistake, it is irregular, and set aside: so irregularity, by surprise, judgment set aside.

1 Burr. 1895, Sadler v. Evans.

§ 2. The plt. gives a warrant of attorney in the action against the principal, it is irregular to use it in an action against the bail.

1 Salk. 89, Bever v. Atwood.

§ 3. Judgment by default against two defts. The plt. executed writs of inquiry against them separately, and took several damages against them. Irregular &c.; and if he enter up final judgment with those several damages against the defts., it is to be set aside as erroneous; but the court may permit the plt. to set his own proceedings aside, before final judgment, on payment of costs; and take judgment *de melioribus damnis*.

6 D. & E. 699, Mitchel v. Milbanks & al.

§ 4. So the plt. after entering judgment on two counts for himself, perceived one of them was bad. He was allowed to waive his judgment on this count, and to enter judgment on it for the deft. This, though correct, does not accord with the case in Salk. 566, in which it is stated, the act of the court upon record, may be altered the same term, though the act of the party cannot be.

2 Bos. & P. 49, Spicer v. Teasdale — Turner v. Barnabas.

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Art 3.

3 Bos. & P.  
607, Hankin  
v. Broom-  
head.

4 D. & E. 688,  
Barlow v.  
Kaye.

7 D. & E. 76,  
Tetherington  
v. Golding.

1 Johns. Cas.  
135, Le Con-  
tea v. Pen-  
dleton.

1 Johns. Cas.  
376, Stansbu-  
ry v. Durell.

2 Johns. Cas.  
226, Thomas  
v. Douglas.

8 Johns. R.  
337, 339,  
Cairnes v.  
Smith.

1 H. Bl. 628,  
Morgan v.  
Johnson.—3  
East, 155,  
Taylor v.  
Phillips —  
8 East, 647, Roberts v. Monkhouse.

§ 5. Judgment by default in debt on a bond. Plt. entered judgment for the penalty, and for £9. 10s. damages and costs. On a writ of inquiry, damages were assessed at £11 15s. 13s. 4d., and costs 40s.; and the plt. entered up another judgment for those damages, together with £31. 6s. 8d. for costs; but afterwards entered a *remittitur* for the costs. Held, the second judgment was erroneous.

§ 6. If an action be brought on a judgment, which is irregular, all the proceedings may be set aside in one rule. The present plt. had signed judgment of *non pros.*, in another action, brought by the deft. against him; this judgment was irregular, on which the plt. sued. The deft. obtained two rules; one, to set aside that irregular judgment; another, the proceedings on it; and held, as above; and the court said, that as the original action was the *substratum* of the whole, if that failed, the after proceedings had on it, whether by execution or another action, failed with it; so the whole set aside in one rule; and so was the practice, even in actions on bail bonds.

§ 7. Held, it is irregular to hold the deft. to bail in *assumpsit*, and then to declare in *trover*, as the causes of action were materially different.

§ 8. The plt. gave regular notice of an intended application, to move for a commission, at the next term, then took an inquest by default. Held, this was irregular; and it was set aside.

The court made an order in a cause, and afterwards a judge, at his chambers, made a further order on the same matter. Held to be irregular.

§ 9. A judge's order was obtained to enlarge the time for pleading, until the second day of the term. Held, the deft. had till the third day to plead; and that a default entered on the second, was irregular: so after a rule to change the venue, the plt. entered a default for want of a plea, without altering the declaration filed, or filing a new one. Held, this was error.

§ 10. It is irregular to issue a second execution, until the first is returned; but if one be issued unadvisedly, it may be withdrawn before any thing is done upon it; but if a sale be made under it, and the sheriff die before he gives a deed, it is irregular to withdraw, or suppress the execution and issue another to the new sheriff to sell the property a second time.

§ 11. The service of notice of a declaration on *Sunday*, is bad, though the deft. accept it, knowing it to be irregular. This is a matter of public policy. Hence, this irregularity cannot depend on assent or waiver of the party. Such pro-

ceedings are absolutely avoided by the statute, 29 Ch. II. c. 7; but formerly there was a decision, that notice of a declaration on Sunday might be given; so notice of a plea filed on Sunday is void, as the 29 Ch. II. c. 7. avoids all process &c. served on that day. CH. 194.  
Art. 4.

§ 12, So in New York, a writ was served on Sunday, and *cepi corpus* returned. Plt. got judgment by default, and execution: irregular; and the court set all the proceedings aside, on condition, no action should be brought against the sheriff for false imprisonment. 3 Johns. R.  
258, Robert-  
son v. Moffat.

§ 13. A motion to set aside proceedings as irregular, must be made at the next term after the irregularity has happened. 1 Johns. Cas.  
248, Mc  
Evers v.  
Markler.

§ 14. The plt. inserted an *ac etiam* in a *capias*, in *assumpsit*; and he afterwards declared in account. The proceedings were set aside for irregularity. The plt. must pursue his action he commences, when the deft. is held to bail. 6 D. & E. 364; 2 Wils. 394. 4 Johns. R.  
485, Rogers  
v. Rogers.

§ 15. Judgment set aside, though strictly regular, to try the merits. *Hatchel v. Griffiths*, 2 Salk. 645. Verdict set aside as irregular, for want of notice of a trial, within a year after issue joined. 2 Salk. 518.

§ 16. If a survey be necessary for a defence, and the plt's. lessor in possession of the adjoining tract, will not permit it to be made, the court cannot enjoin him to allow it; but will stay the proceedings, until he consents the boundary line be run. 3 Caines' R.  
82, Jackson  
v. Murphy.

§ 17. If, in ejectment, the tenant swear to a good defence, the court will take off his default, occasioned by his mistake, in thinking the Supreme Court was held at the Circuit. 3 Johns. R. 448. 3 Caines' R.  
133, Jackson  
v. Stiles.

ART. 4. *Proceedings not set aside, though objected to as irregular &c.*

§ 1. Writ of error admits the judgment is regular. As where judgment against the deft., and he brought error, and then got a reference to the master to examine, if the judgment was regular. On his report, held, the deft., by bringing error, allowed the judgment was regular; and so was barred to examine its regularity, after error brought. Salk. 402.

§ 2. The deft. moved to set proceedings aside, as irregular, in an action on a penal statute. The plt. had taken out five rules, for time to declare, and served none on the deft. till the last was taken out; then served all of them, and delivered a declaration to the deft. He objected, this was irregular; but the court said, the deft. might have signed a *non pros.* for not declaring in time; but the deft. having omitted that, and the plt. having, though late, served the rules, he has redeemed his irregularity; and the deft. is too late to take advantage of it. 1 W. Bl. 290,  
Jans, q. l. r.  
Hutton.

§ 3. Action on a policy of insurance. Jury found a special 1 Wils. 121,  
Pond v. King

CH. 194. verdict. Plt. died since the term commenced. Allowed, the  
 Art. 4. judgment be entered as of the first day of it, by consent ; and  
 no writ of error to be brought.

1 W. Bl. 35,  
 Willet v.  
 Atterton.

§ 4. The plt. in *assumpsit*, by mistake, irregularly signed judgment. Court refused to set it aside, to let the deft. in to plead the statute of limitations ; but would do it on his engaging to plead the general issue.

Lofft, 145.

§ 5. *Qui peccat in syllaba peccabit in tota causa*, is not to be taken generally ; and it is less to be admitted in civil causes, than in criminal charges ; and less in civil, on the defensive side, which is favoured, than upon the adverse, in which greater nicety is used.

Lofft, 236.

§ 6. Irregularity may be waived by the other side's continuing the process ; as if it had not been committed : so an informal issue, bad on demurrer, is cured by verdict ; and the exception is lost by not taking it in time.

2 Stra. 973.

1 Wils. 264,  
 Traverse v.  
 Buckley &  
 ux.

§ 7. A bill was exhibited against *baron and feme* ; and she alone, was taken by process of contempt ; and afterwards she entered her appearance, and asked for time to answer without her husband ; and held, this was regular. Were joint administrators in her right ; and were served with a *subpœna* in France. It was objected, that it was irregular to take up a *feme covert*, upon an attachment, to compel her appearance separately.

2 Stra. 1266,  
 Thompson v.  
 Teller.

§ 8. Deft., by leave, pleaded *non assumpsit*, and the statute of limitations, and delivered it to the plt's. attorney, who proceeded irregularly, and then corrected the mistake. Deft. made no defence. Court refused to set the proceedings aside, because the deft's. attorney was in the first fault, in not leaving the pleas in the office, the result of which was the plt's. irregular step.

3 Wils. 413,  
 Jackson v.  
 Harriot Ford.

§ 9. She was sued in *assumpsit*, by this name of Harriot Ford, spinster ; and her plea was,—and the said Ann White, who is sued by the name of Harriot Ford, who is within the age of twenty-years, by James Ford, her next friend and guardian, by the court here specially admitted, comes &c., and pleaded infancy. Demurrer to her plea, specially ; and stated Harriot Ford was sued, and no Ann White was named in the declaration, and yet she began her plea, “ and the said Ann White,” which was repugnant to the declaration &c. Joinder &c. Court held her plea bad, because she did not say by whom she was sued ; and that the words, *the said*, were not surplusage. Deft. had leave to amend.

2 Wils. 380,  
 Freeland v.  
 Hunt.

§ 10. The plt. in his declaration, made a fatal mistake. Judgment by default ; and a writ of inquiry executed. The court refused to let the deft. take advantage of the mistake, because he did not rely on it, but made a defence, on executing the writ of inquiry.

§ 11. Deft. was sued by the name of *Richard Finch*, and he entered a common appearance, by his true name of *John Finch*; and the plt. declared against him, by his true name. Motion to set aside the proceedings as irregular. Motion refused; and the court would not interpose. *Secus*, if the plt. file common bail for the deft. by his right name.

C. H. 194.  
Art. 4.

2 Wils. 393,  
Hole v.  
Finch.—3 D.  
& E. 511,  
Doe v Butcher.

§ 12. The deft. was served with process, by the name of *William Giles*, his true name being *Edward*. He did not appear. The plt. served him with notice of a declaration, by his right name, and got judgment and execution. Motion to set the proceedings aside as irregular. Refused; for the court held, he should have appeared, and pleaded such a misnomer in abatement; but afterwards he was let in to defend on paying costs; and on a further affidavit, stating the deft's. attorney was misled by the authorities and books of practice, and had advised the deft. not to appear, and defend himself against what was deemed a nugatory process; also swearing to merits.

3 East, 167,  
168, Oakley  
q. t. v. Giles.

§ 13. The deft. was arrested by the name of *Francis Hubbard*. He put in bail by the name of *Samuel Hubbard*; and the plt. declared against him thus: "*Samuel Hubbard arrested by the name of Francis Hubbard, was attached to answer*" &c. The deft. pleaded, thus: "and the said *Samuel Hubbard*, against whom the said original writ of the said *George*, has been sued out by the name of *Francis Hubbard*, in his proper person, comes and pleads, that he was baptized &c.;" so stated his name was *Samuel*, and ever so known &c., and never known and called by the name of *Francis* &c.; and this the said *Samuel* is ready to verify &c.; and prayed judgment the said writ be quashed. Affidavit of the facts &c. Plt. treated this plea as a nullity; and signed judgment; and the court refused to set it aside. The court seems to have gone on the ground, that the defect, the misnomer, "*Francis*," was only in the mesne process, which was at an end by the deft's. appearance; and by it, the defect in the mesne process was cured. The declaration was headed against *Samuel*, and was throughout against *Samuel*, and recited the writ as against *Samuel*; and it was not shewn it was not so; but held, the plea had been good, if the declaration also had been against *Francis*; but here the declaration was right. Defects in the mesne process, were cured by appearance; and it did not appear the writ was wrong; and as the court allowed the writ to be made out after the mesne process, the presumption was, it would be right. Here then the error in the original writ did not properly appear, on which the deft's. plea proceeded. And 1 Bos. & P. 250, held, the deft. must take advantage of an irregularity in the writ before appearance. Fox & al.

1 Bos. & P.  
644, Murray  
v. Hubbard —  
And 1 Bos.  
& P. 105.—3  
D. & E. 660.

CH. 194. *v. Mory*; and 3 Cranch, 496, 498. The deft's. appearance by attorney cures all antecedent irregularity of process.

Art. 4.

1 Johns. R.  
62, 65, Ballou  
& al. *v.* Hu-  
bert.

§ 14. One only, of two defts., was taken on a *capias ad respondendum*; but judgment was entered, and execution issued against both; but only the deft. originally arrested, was taken on the *ca. sa.*; and the court refused to set aside the execution as irregular. But, it seems, otherwise, if the other deft. had been taken in execution.

6 Johns. R.  
296, 319,  
Denton *v.*  
Noyes—1  
Salk. 88—5  
Mod. 205—1  
Stra. 693.

§ 15. A writ was issued against the deft., but was not served; an attorney appeared for him, but without authority from him, and confessed a judgment, which was entered up in vacation. Held, the judgment was regular; yet it must have appeared, that no writ had been served. Van Ness J. dissented. And the court leaves the assumed client to his remedy against him, if fully responsible.

7 Johns. R.  
556, Thomp-  
son *v.* Skin-  
ner.

§ 16. After the lapse of twenty years, no judicial proceeding can be set aside for irregularity. A writ made returnable before &c. is voidable only, and will not be set aside, but may be amended. 5 Johns. R. 233, Morrill *v.* Waggoner.

2 Johns. Ca.  
221, Hildreth  
*v.* Harvy.

§ 17. A rule regularly obtained in the absence of the counsel of the other party, will not be vacated as irregular or improper, at a subsequent term.

2 Johns. Ca.  
282, Crav-  
mond *v.*  
Roosevelt.

§ 18. Where the attorney for the deft. suffered an inquest to be taken by default at the sittings, supposing there was no defence; the court refused to set aside the default, to let the deft. in to prove usury, as a defence.

8 Johns. R.  
352, Pugsley  
*v.* Van Allen.  
—Impey's  
K. B. 252—  
2 Crompton,  
458.

§ 19. A rule to set aside a default and subsequent proceedings, was granted, on payment of costs. These were regularly demanded of the deft., but not paid, and the plt. afterwards issued execution on the judgment. The court refused to set this execution aside. And where a rule is granted on payment of costs, it is conditional, and is of no force unless the costs be paid *instantly*, and the party who is to pay costs, must seek, and tender them to the other party. In not paying these, it seems, there is no contempt.

2 Dallas, 380,  
381, Han-  
cock, admr.  
*v.* Hilton—  
9 Johns. R.  
264.

§ 20. The parties agree to enter judgment on a promissory note for what may be due, where several partial payments have been made, and an amount due; a judge in vacation may enlarge the time for making a case ascertained, and then execution is taken out; this is regular, and proceedings will not be set aside; but if execution be taken out before the amount due is ascertained, proceedings will be stayed.

3 Dall. 87,  
in Doane's  
case.—3  
Cranch, 496.

§ 21. Where a motion to appear is necessary, and there is none, and so far the proceedings are irregular, yet, as such defect is cured by actual appearance, the proceedings will not be set aside. And an appearance by attorney cures all irregularity of process; because, as before stated, by appear-

ance, there is an end of mesne process, the real object of which is to bring in the party, and acutually make him a party to the suit in court ; and this is done whenever he duly appears. CH. 194.  
Art. 5.

§ 22. The deft. accepted a declaration, and acted as if an appearance had been entered for him. Held, the court would not allow him to set the proceedings aside, as the judgment &c., for want of an appearance being entered. New R. 309,  
Williams v.  
Strahan.

§ 23. If the plt. consent to try the cause on a bad plea, and the judge admits evidence not authorized, the plt. cannot have the verdict set aside. 1 Johns. R.  
509, Meyer  
v. M'Lean.

§ 24. The rule, that appearance puts an end to mesne process, and cures all defects in it, does not appear to be well settled. Perhaps it ought to be so where the party has had timely notice to appear and answer ; but *secus*, if he has not had this notice, and appears, as he may, merely to except to the irregularity.

§ 25. The citation in error must be served thirty days before the first day of the term, and if not, the court will not compel a cause to be heard. 1 Cranch, 365. Court may take it up after thirty days' notice, by consent. 5 Cranch,  
321.

§ 26. The plt. may in this declaration claim the whole of a tract of land, and give in evidence a deed that proves his title to an undivided part. 9 Cranch,  
151. Doe v.  
M'Farland &  
al.

§ 27. An attorney's mistake of a rule of practice may prevent a nonsuit, but not costs. 1 Caines R.  
22.

If a witness be in the plt.'s. power, he must prove endeavours to obtain his testimony, in order to be excused for not going to trial : 2. If offers of compromise have been made to the plt. and refused, the court will not order them to be imposed, on a motion for a nonsuit. 1 Caine's R.  
171, Deas v.  
Smith.

§ 28. Under the rule for the deft's. counsel to say whether he has a defence, it is sufficient for the counsel to say that his client has instructed him to defend ; and that he expects the cause will be tried, unless previously settled. 3 Day's Ca.  
495, Terry v.  
Capen.

§ 29. General rule, " whenever a motion shall be made in arrest of judgment, copies of the pleadings, or of so much thereof as shall be necessary, shall be delivered to each of the judges on making the motion." 10 Johns. R.  
128.

#### ART. 5. Notice pending suits &c.

§ 1. Notice is of two kinds. Notice somewhat in the nature of request or demand, and notice that is the ground of right, and the foundation of an action ; and essential to the supporting of it, and must precede it, as giving notice a bill or note is dishonoured, and not paid, though demanded ; and giving notice of a multitude of other acts and things done, or to be done, without giving which, the plt. cannot entitle him-

CH. 194. self to an action &c. This kind of notice has been already  
 Art. 5. largely considered in connexion with requests and demands.

§ 2. *Notice pending suits and controversies is in many instances.* The great object of which is twofold,—to give the party an opportunity seasonably to be heard, or to plead &c. : 2. In order to have a right to default him, if he do not appear or plead in reasonable time, or in some prescribed time. This kind of notice is material in almost every step in judicial proceedings, as notice of declarations, or pleas filed, to produce deeds or papers, books, &c., notice of trial, of errors assigned, of referees meeting to hear parties, notice of sales, appraisements, &c. Though notice is so infinitely various in practice, in time, manner, and form, yet the object is the same, and the principle, founded in the common law and in reason, is the same in every case ; that is, seasonably, to enable one to act for himself, and take care of his interest in the case, and then, having this opportunity, he neglects it, justly to proceed against him on his default, neglect, or failure. It is very rare that this kind of notice pending suits &c., is the subject of legislation, or of statute law, or can be ; so infinitely various is it in practice, as to time, circumstances, situations of parties, of courts, &c. But must, whether in prescribed forms, given in times fixed, or generally, according to the dictates of reason, depend on the occasional rules of courts, made from time to time, on each new occasion, or on their practice, or the practice of various offices, and, not unfrequently, the usages of parties. Hence, as to time, forms, and in detail ; these are very various in different States, in different courts in the same State, at different times in the same court ; also varying every where according to the nature and kind of different causes and proceedings. In summary proceedings, short notice ; in regard to solemn trial, long notice, &c.

§ 3. In two instances, at least, the rules of practice of a foreign court or courts, have been adopted in the United States, in the lump.

5 Johns. R.  
 235, Dubois  
 v. Phillips.

§ 4. As in New York, the Superior Court there adopted as rules of practice, in cases not provided for by the rules of that court, the practice of the Court of King's Bench in England, obliging the parties and officers to resort to the rules of practice of that court, in every case, in which rules of practice have not been established in this New York court.

1 Cranch.  
 —2 Dall. 399,  
 411.—A. D.  
 1792.

§ 5. So by the seventh rule of the rules of practice of the Supreme Court of the United States, the practice of that court is to be conformable to that of the King's Bench and Chancery in England, in all cases not specially provided for. It must be extremely difficult for an American lawyer correctly to understand the numerous rules of practice in those

English courts, so numerous and perplexed, that it requires a long life of practice in those courts themselves, to understand them. CH. 194.  
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§ 6. It is not intended here to collect rules of notice, in many cases, but in a few only, illustrative of the principles merely, on which notice, pending suits, &c. is required.

§ 7. 1st. It is a general rule, where a party is entitled to notice, in order to his appearance, and pleading or doing other acts in the suit, and he has not this notice, and so has an exception for want of it; yet if he appears and pleads, or does the act, or appears in season to do it, the exception is waived; for whoever is entitled to notice, and it is for his benefit, he may waive it, and without it act as if he had it. And the fair construction of such act is a waiver of his exception to the want of it;—but then the party's appearance must be a proper one; that is, with an intention to be a party to the suit or controversy, or reference, and not merely accidental; or merely to take the exception.

6 Johns. R.  
328 — Dallas,  
331.—7  
Johns. R.  
207, Bowley  
v. Stoddard.  
—10 Johns.  
R. 486, short  
notice.

§ 8. 2d. Service of notice must be on the proper person and day. Therefore, if a rule be served on the wife, where her husband went beyond sea a week before, it is a bad service of the rule or notice; for in this case it is contrary to the fact, to presume he had notice of it;—otherwise, had he been at home, though not personally served. So service of notice of a declaration on Sunday is bad, article 1, this chapter.

2 Stra. 1044,  
Rex v.  
Badouin.—  
Coleman, 50,  
75, 85.—1  
Caine's R. 73.

§ 9. If the party have an attorney in the country, and an agent in town, notice of the executing a writ of inquiry in a country cause, shall be served on this agent, as being the most convenient practice. Practice in such cases was not settled till 1803. If served on an attorney's clerk, must be in his office.

3 East, 568,  
Hayes v.  
Perkins.—3  
Johns. R. 149.  
—Coleman,  
135.

§ 15. In proceedings on the act for the relief of debtors, as to the imprisonment of their persons; held, where the plt. creditor, resides out of the State, service of notice of the petition on his attorney is sufficient.

1 Johns. Ca.  
80, Bates v.  
Williams,  
410.

§ 11. Where notice may be served on the party's attorney, service of it must be on some person in the house, or office of the attorney of the opposite party, and it must be shewn that every thing has been done to bring it home to the party.

1 Johns. Ca.  
186, Galtstor  
v. Swart-  
wout.

§ 12. Service was on a person in an attorney's office, who appeared to be one of his family; held to be no sufficient service on the attorney, where the receipt of the notice was denied, and no reason given why there was not a better service.

1 Johns. Cas.  
244, Salter v.  
Bridgen.

§ 13. So service of notice of a motion by leaving it at the attorney's lodgings, is not sufficient. It ought to be personally served, or be left at his office or place of business.

1 Johns. Cas.  
331, Jackson  
v. Eacker.

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2 Johns. R.  
114, Jackson  
v. Larroway;  
Verney v.  
Benedict.  
2 Dallas, 235.

§ 14. So notice of taxing costs must be served on the attorney, not on the counsel in the cause; and where an attorney is employed, notice must be served on him, not on the party; 2 Johns. Cas. 126; and notice of a rule to join in error, must be on the deft. *personally*, where he employs no attorney; and 8 Johns. R. 360.

The marshal must serve attachments on witnesses who disobey a *subpœna*, if they reside in the district.

1 Johns. R.  
509, Graves v.  
Miller.

§ 15. Service of notice of a rule to assign errors, must be personal, or good reasons shown why it is not; and that it has been left at the last and usual place of abode of the party, where he has moved out of the county.

6 Johns. R.  
132, Lee v.  
Brown & al.

§ 16. The plt. resided in a *foreign* country; the deft. produced affidavits to prove the judgment was satisfied; a rule to show cause why a satisfaction should not be entered on the record, was granted, and the court directed it to be served by delivering a copy of it to the *plt's. attorney* on record, and putting up another at the clerk's office.

2 Dallas, 150,  
151.

§ 17. Notice of a trial given to the deft. in ejectment, is sufficient; it need not be given to the landlord; and wherever he means to make defence, he ought to make himself a party to the record. *Clayton's lessee v. Alshouse*.

7 Johns. R.  
537, 538,  
Dizen & al. v.  
Bates.

The deft. after an appearance, entered a rule in vacation, to declare before the end of next term; this was served on the agent of the plt's. attorney. Held, the service of the notice of the rule might be any time before the term, and if the plt. did not declare before the end of it, his default might be entered, though forty days had not elapsed from serving the notice on the agent.

2 Johns. Cas.  
111, Knapp v.  
Mead.

3d. *Manner of notice*. Pursuant to four days' notice, as in cases of special motions, a trial by record is to be brought on by motion.

3 Johns. R.  
144, Clinton  
v. Mitchell.

§ 18. In an action for a libel, the deft. pleaded *not guilty*, and gave notice of certain facts he meant to prove at the trial; afterwards he moved to strike out the notice; the court refused the motion, unless he would make affidavit of the falsehood of the matters stated in the notice; but why? he might waive the facts, though true, thinking they would have no weight in the cause; such practice is not favoured.

1 Johns. Cas.  
391, Graves v.  
Hassenfrats.

§ 19. Where an attorney appears for the deft., a copy of the declaration may be served by putting it up in the office, with notice to plead in twenty days.

3 D. & E.  
660, general  
rule.

§ 20. Where short notice of trial is to be given in a country cause, this notice must be given four days, at least, before the commission day, one day exclusive, and the other inclusive.

§ 21. Though the courts of the United States, and of several States, have adopted the rules of practice of English courts,

yet it is evident they often do not apply in the United States, especially as to time, depending on distances; for distances are most material in this respect, and are so considered in England; therefore, in that country, time of notice, and after notice, is generally regulated by distances; as miles distant from London &c.; and this is computed as to notice of trial &c. by the usual mode of computation, and not by admeasurement.

§ 22. Notice of trial is necessary, though by rule of court the trial is put off to a certain day in another term; this day being by rule of court, the secondaries certified, the plt., by the rules of practice, must give notice of the trial.

§ 23. Deft. gives notice of bail in his *proper person*, and the plt. serves him with a copy of the declaration and notice of rule to plead, and afterwards the deft. retains an attorney; the plt. need not serve another copy and notice on him. Where the service of the notice is insufficient, the court will deny the application, though unopposed. 3 Caines' R. 88.

§ 24. *Notice pending suits &c.* In Massachusetts and States, not adopting English rules of practice, such notice is very uncommon, except in matters of reference, and taking depositions. Among all the rules of practice in Massachusetts, made by the court, since the American revolution, there is no one that requires one party to give notice to the other, pending any suit or controversy. Several statutes of the legislature require notice to be given in cases of references, and in taking depositions in pending suits, already mentioned. Other matters of practice in Massachusetts courts will be found under their appropriate heads, as Amendments, Appeals, Continuances, Defence, Default, Discontinuances, Double Pleadings, Error, *Certiorari*, General Issue, Pleas and Pleadings, New Trials, Reviews, Repleader, Endorsing Writs, Withdrawing Pleas, Nonsuits, Indictments, *Oyer*, Plea issuable, Pleas since last continuance, &c. Practice in the other courts in New England is nearly the same as in Massachusetts, especially in this important point of view. They do not adopt the English rules of practice; but generally their practice is essentially governed by statute provisions, and a few express rules of court, enacted, not as a system of practice, but are provisions and rules applicable to, and mixed in, certain branches of the law.

§ 25. But notice given pending suits, is, in many cases, in New York required. See heads Notice and Practice, in the Reports of Caines and Johnson, as notice of argument, of motion for judgment, 1 Caines' R. 67, 487; how served 73, 343; 2 Caines' R. 95, 102; of the point to be relied on in argument, 274; manner of service, 252, 343; 2 Caines' R. 256, 384; 3 Do. 126, 127, 131.

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2 Stra. 954,  
Bates v.  
Pettipher.

2 W. Black.  
798, Ellis v.  
Trusler.

2 Johns. Ca.  
287, Haskins  
v. Snowden.

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## Art. 6.

ART. 6. *Delay of trial.*

§ 1. Trials are, of course, in every State and country, for various causes put off or delayed, to give time to one or both parties, to be better prepared for trial. It cannot be within the compass of a work of this kind, to consider them in detail, or even to name them all. However, a large part of the reasons for delaying trials will be found to be because a party has material witnesses absent, or at a distance, whose testimony cannot be obtained without considerable delay. Then the question is for the consideration of the court,—Are there good reasons for postponing the trial of the cause in order to procure this testimony? Several cases are found on this point, that serve as valuable rules in this part of practice; English cases, as where the court refused to put off a trial, on the general affidavit of the absence of material witnesses, where the case was *suspicious*, and the witnesses were foreigners, never likely to return to England.

3 Burr. 1513,  
Rex v. D'Eon.

1 Bl. 512,  
Rex v. Williams.

Lofft, 187,  
Zoffani v.  
Jennings.

Lofft, 653.—  
4 Burr. 1513.

1 H. Bl. 637,  
Sullivan v.  
Magill.

1 Bos. & P.  
453, Robin-  
son v. Smith.

§ 2. But the court in this case put off the trial till a commission should issue to examine a material witness, who was out of England, and refused to attend the trial. The witness was in Scotland, and so out of the reach of the process of an English court. Sellon's Practice, 418, 420.

§ 3. The affidavit to put off the trial was, that A was a material witness in the cause, was major of a regiment beyond sea, at a place named; not allowed, because there did not appear to be merits in the case; though perhaps it would have been put off, if merits had been shown.

§ 4. The affidavit to put off a trial for want of a material witness, must be full to the cause; show the party has such a witness, who is material to the cause, and there are reasonable hopes of producing him, if the cause be put off for trial.

§ 5. In this case, the court held, that the affidavit of an attorney's clerk, to put off a trial, should state that he is particularly acquainted with the circumstances of the cause, and has the management of it. See 2 Caines' R. 354; 1 Peters, 217.

§ 6. And in this case, the court refused to put off a trial on account of a material witness' absence, by whose testimony the defence of *slavery* was to be established; for, said the court, "it is an odious defence, to which the court will give no assistance." "It is as much a denial of justice as the plea of *alien enemy*," which the court always discourages. The defence was, that the plt., who sued for mariner's wages, was a slave to the deft. It is to be inferred from this case, as from many others, that the court conceived its power to put off a trial for the absence of a material witness, was discretionary: and that it was fit to exercise their discretion, and allow time, or not,

to obtain his testimony, according to the merits or demerits of the claim or defence such testimony is intended to support. CH. 194.  
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§ 7. So the party moving to put off a trial, should show he is ready to admit necessary facts that are only of a form to be proved by witnesses. Lofft, 679.

§ 8. So where a witness will be absent eighteen months, a special case is requisite to put off a trial for want of his testimony. 1 W. Bl. 436,  
Lord v. Cook.

§ 9. The court will enlarge the time of trial where a witness cannot be come at, and the other party, though the witness was abroad before the action was commenced, and not returned since, refuses to admit the effect of his evidence. These cases, being founded in reason and the principles of the common law, are every where to be regarded. Lofft, 282.

§ 10. Two indicted and tried for larceny, and the jury acquitted one, but could not agree as to the other; the court discharged the "jury of the indictment, and the one acquitted was ordered to go without day; and the indictment continued as to the other. 12 Mass. R. 313.

If from the number of prior causes, the plt. has no reason to expect a trial, though by unforeseen events after causes come to trial, the court will not order judgment, as in case of a nonsuit, nor costs, nor stipulation to have judgment of nonsuit. On motion for not going to trial, the attorney in the cause must state in his affidavit, the cause was not brought on for trial. 3 Caines' R. 128, Jackson v. Valentine.  
3 Caines' R. 136, Jackson v. Woodworth.

*Cases in New York.* These are usually on the same principles as the English cases, with some few variations. 1 Caines' R. 115, 603.

The rule in that State is not to grant a commission to examine witnesses abroad, and to delay the trial accordingly, until after issue is joined in the cause; on a motion to put off a trial for this cause, the nature and amount of the evidence ought to be disclosed, and till issue joined, the court cannot see how it will apply to the cause. 3 Johns. R. 259, Jackson v. Bancroft; and Coleman, 97.

§ 11. If the deft. neglect to give notice of a motion for a commission to examine witnesses, until after the cause is noticed for trial, he cannot have the benefit of his motion, but on paying costs. 1 Johns. Cas. 691, Burr v. Skinner.

§ 12. Where the plt. neglects to go on to trial, on account of an absent witness, who is material in the cause, and who had been duly *subpœnaed*, he is not obliged to stipulate, to prevent a nonsuit. 2 Johns. R. 480, Marseles v. Clopper.

§ 13. A material witness for the plt. unexpectedly went abroad, so that he could not be *subpœnaed* for the trial; the court held this was a good excuse for the plt. for not proceeding to a trial, pursuant to the stipulation made to that effect. 2 Johns. Cas. 218, Nixon v. Hallet & al.

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1 Johns. Cas.  
392.1 Caines' R.  
517.

1 Dallas, 251.

1 Dallas, 81,  
Hunter's  
lessee v.  
Kennedy.

1 Dallas, 9.

2 Dallas, 44,  
45, 94, 183,  
White v.  
Lynch.1 Dallas, 185.  
—In an ac-  
tion against  
two defts., a  
confession by  
one does not  
authorize  
judgment  
against both.New Jersey,  
1 Penning,  
68.

§ 14. To change the *venue* in a cause, it is not enough that material witnesses reside in another county, but the party must show there is some material fact happening in the county, to which he wishes the *venue* to be changed. Three months is sufficient for executing and returning a commission from London to New York after its arrival in London.

§ 15. *Pennsylvania &c.* The plt., after stating the want of a material witness, who had been *subpœnaed*, put off the trial, on that account; but the court granted a rule to the deft. for trial next term, or *non pros*.

§ 16. The affidavit of one, who was landlord to the deft. in ejectment, was admitted, on motion to put off the trial of the cause.

§ 17. On an affidavit of the absence of a material witness, the trial of a misdemeanour was put off; but the court said, it should not be a precedent. Deft. was a minister, and indicted for marrying &c. against law.

§ 18. Where the witness was an attorney of the court, and had promised to attend, held, it was not necessary to take out a *subpœna*, in order to ground a motion to put off the trial. 383.

§ 19. In this case, on affidavit of the absence of a material witness, the court put off the trial, refusing to inquire what his testimony would be. This was carrying the court's indulgence to a great extreme, contrary to the general principle of practice, not to inquire what the testimony would be. Whereas, if the court had inquired into the nature and amount of it, in the presence of the parties, it might have appeared to be wholly immaterial, or to prove no fact but what the other party would admit. 4 Binney, 243, Davidson v. Brown; 3 Day, 280, 308; 4 Day, 471.

§ 20. *Massachusetts.* In this State, putting off a trial or continuing the action, the usual term here, on account of the absence of a material witness, rests principally upon two rules of the Supreme Judicial Court; one made at Portland, July 16, 1789, which directs, the party "shall file an affidavit, in writing, under his hand, naming the supposed absent witness, mentioning the reasons wherefore he has not provided him, or his deposition, and inserting the facts he expects the witness will testify, and the grounds of such expectation," to enable the court to judge &c.; another rule of the same court, made at Boston, February term, 1796, which adds, "if the adverse party will admit, that such absent witness would testify to the facts stated by the deponent, in his affidavit, if present in court, and that the same shall be received and considered in the trial of the cause, in like manner, as if such witness had personally so testified in court, that in such case, the action shall not be continued for such cause only." These two rules,

the result of practice and experience, embrace all that is essential on this subject ; and in carrying into effect, the usual question is,—Does the party's case come within the principles of these rules ? But a few decisions have been had upon them in our practice ; these few have been already stated. See these rules and cases further explained, Ch. 187, a. 3 ; Affidavits and *Dedimus*, and Ch. 87, a. 2 ; Ch. 90, a. 12 ; Ch. 112, a. 5 ; and head *Dedimus*, and Depositions, and Affidavits, in the index ; also Continuances or Imparlanes, Ch. 175, a. 18.

§ 21. Error from the Circuit Court for the District of Georgia. *Assumpsit* on a special promise to pay interest on a decree in chancery. Held, 1. It is not necessary the transcript of the record contain the names of the jurors &c. : 2. Though it appear by the record the plt. below was an alien, and by a war breaking out is become an alien enemy, after judgment below, yet he must have judgment affirmed above.

§ 22. The plt. declares against A & B jointly, as in custody, but in fact only A was so. Held, the plt. cannot abate his suit as against B, except empowered to do so, by the officer's return, as to B, that is, that B is no inhabitant of his District, (Virginia) ; then the suit may abate as to B ; and then the plt. may have judgment against A alone. The plt. in Virginia is not bound to declare till all the defts. have appeared, or the suit is abated as to some of them : was debt on a judgment in Maryland. Judgment against A alone, below, reversed. Same principle in Massachusetts, Ch. 176, a. 3, s. 11, *Norcroft v. Hallowell* ; Ch. 175, a. 8, s. 13 to 17. Six heirs gave a joint and several bond to the administrator, to pay their parts of any debts he should be obliged to pay. All were sued ; two only arrested. Judgment against the two.

§ 23. *Motion*. On a motion, and no opposition, the court only inquires if notice has been regularly served. An application for a new trial, on account of newly discovered evidence, is an enumerated motion : so is an application for judgment, on a frivolous demurrer ; and if the notice of motion specify it will be grounded thereon, it will give the applicant a priority before other enumerated causes, and entitle him to judgment, on reading the affidavit of service, and of general notice of argument, if no opposition. To gain a priority on a motion for judgment, on such a demurrer, the notice must state the frivolousness, as the ground of application.

§ 24. A motion to arrest judgment, is a non-enumerated one ; and the reasons need not be specified in the notice, as they appear in the record. Every objection to bringing on a motion, must be made before the arguments thereon are commenced ; and if not so, is waived ; and the court will infer

CH. 194.  
Art. 6.

9 Cranch,  
180, Owens  
v. Hanney.

7 Cranch,  
194, Barton  
v. Petit & al.  
in error.

Moss & al. v.  
Moss, adm'r.  
4 Hen. & M.  
293, 414.

Coleman,  
128.—2  
Caines' R.  
94, 100.

3 Caines' R.  
129.

2 Caines' R.  
221, Hough  
v. Stover.—3  
Caines' R.  
105, Ros-  
well v. Dean.  
—Id. 385.

Ch. 194. what ought to have been inserted in an affidavit to support a motion, and is not, did not exist. A trial by record is a non-enumerated motion.

1 Caines' R. 152, 557.—2 Caines' R. 104.—3 Caines' R 86, and 174, Tower v. Wilson.

§ 25. The applicant is to be confined to the objections, in his notice to the other party. *Alexander v. Esten*. Notice must express time and place, or it is wholly defective; but of motion, need not state where the court will be held. Notice for trial stating the day of the month right, is sufficient, though it mistake the day of the week. *Wolfe v. Horton*. If the party serving notice, has not kept a copy, he may, by parol evidence, prove the contents.

ART. 7. *Usages in different States.*

Chipman, 26, Oliver v. Chamberlain.

§ 1. *In Vermont*. The court does not give judgment against the sheriff for an escape, on *mesne process*, till the plt. enters into a rule, to allow him the benefit of the original judgment, he indemnifying the plt. from costs.

§ 2. *In Massachusetts*. See *Paine v. Mc Intyre*; *Phelps v. Hartwell*; *Paddelford v. Hall*; *Paine v. Gill & al.*; *Blancy v. Sargeant*; *Barnes v. Bull & al.*; *Brown v. Bull*; *Thaxter v. Weston*; *Gould v. Barnard*; *Batchelder v. Batchelder*; *Brown v. Swan*; *Bangs v. Snow*, and many other cases in this work, depending on usages in this State.

Kirby, 12, Nott v. Willes.—Kirby, 170, Snow & al. v. Antrim.

§ 3. *In Connecticut*. Recognisances for special bail, taken to the adverse party, are well taken, though generally to the county treasurer. A defective service of a writ of error can be taken advantage of but by plea in abatement. 2 Day's Ca. 552, *Bulkley v. Starr*. When a citation is served on the conservator, he is entitled only to reasonable notice; and if the time be too short for him to prepare his case, the court will allow him time to do it.

Kirby, 232, Barker v. Wiltford.

One possessing the court's files, is ruled to bring them into court, within a time named, and if he neglect so to do, he is liable to the process of contempt.

2 Day's Ca. 405, Wolcott v. Dwight.

A deft. in error, living in another State, is well served by copies of the writ left with him, by indifferent persons; and also with his attorney, residing in Connecticut. And *Id.* 416, *Bennet v. Howard*; see *Service of Writs*, Ch. 175.

Kirby, 344.—Kirby, 269, Richards v. Way.—Kirby, 361, Babcock v. James.

A motion for bonds for prosecution, is too late after the jury is impannelled. Where the deft. is entitled to costs, on the plt's discontinuance, the deft. cannot have them in a subsequent term. An action regularly entered on the docket of the Common Pleas, and called three times, and neither party appears, is discontinued; and can be revived but by consent of both parties.

1 Day's Ca. 141, Bishop v. Bull.—2 Day's Ca. 272.

*Assumpsit* on the joint contract of A & B, and the writ describes A as living out of the State, and is served on B, the service is good, though A return into Connecticut, and there

become an inhabitant before the return day. Two debts. are sued for a book debt, one pleads the general issue, decided against him. The other pleads *nil debet*, and found for him. Judgment for costs for both debts. *Rockwell v. Sheldon*, 2 Day's Ca. 305. A general order by a judge of probate, to sell all the lands of an insolvent, extends to all his estate known to the judge, at that time. A judgment on a *cognovit* may be entered in the vacation.

CH. 194.  
Art. 7.

§ 4. *Further cases in New York.* See a. 6, s. 10 to 14, and other cases. Where debts. plead severally, the cause is still entitled against all, but notices &c. must be served on each. A cause cannot be set down for hearing, in the court for the correction of errors, till cases are delivered. *Hallet & al. v. Jenks*, 3 Cranch, 210.

1 Caines' R. 498.

1 Caines' R. 19, Jackson v. Cooper.—2 Caines' Ca. Error, 86.

§ 5. If a cause come before this court, on appeal from an interlocutory order of the chancellor, and the whole merits of the case appear, this court will make a final decree, and direct him to carry it into effect.

2 Caines' Ca. in Error, 66, Bush v. Livingston.

§ 6. The court will not, though requested by both parties, take cognizance of a cause, unless brought judicially before it.

3 Caines' R. 170, Bradt v. Cray.

On an intended motion to set aside the report of referees, a judge's order expires with the term. 3 Caines' R. 152.

§ 7. If all the debts. be not brought in, and those appearing enter a rule to declare, the plt. must do so, or get further time; and to entitle him to it, from time to time, must show he is proceeding to outlawry against those not found, and this is sufficient; but if he do neither, he will be liable to a *non pros.* on the application of the debts. brought in.

3 Caines' R. 98, Shaw & al. v. Colfax.

§ 8. A counsel, at *nisi prius*, if asked, must state whether his client has a defence. When the public prosecutor is attending the duties of his office, his causes, though called on, are not put at the foot of the callendar; but if, after the criminal court is adjourned, younger issues be tried, he will lose his preference, and be liable to nonsuit as others are.

3 Caines' R. 100.—1 Caines' R. 58, Mc Vickar & al. v. Alden.

§ 9. A younger issue being tried, is not always conclusive, that a cause might have been brought on, as the court may sometimes take up a cause they think short, when they would not a long one.

1 Caines' R. 115, Weed v. Ellis.

§ 10. If the plt. by consent of the court, is discharged from his agreements, the debt. is restored to all his rights he had when it was made; and it is a rule of the Supreme Court to take no notice of agreements between attorneys, unless in writing.

1 Caines' R. 117, Malin v. Kenny & al. —Id. 148.

§ 11. All causes must be noticed for the first day of the term, or the omission excused; but a party's misapprehension of a rule, has often been received as an excuse.

1 Caines' R. 150, Lusher v. Walton.

§ 12. A cause is not ready for argument, till the points are

3 Caines' R. 378.

CH. 195. put in writing ; and if only verbally stated, the court will not suffer the argument to be brought on.

Art. 1.

1 Caines' R.  
505, 518,  
Shuter v.  
Hallet.

§ 13. A judge's certificate of probable cause, does not stay proceedings, unless accompanied with notice of motion. Kirby v. Cogswell. After verdict for the plt. and such certificate granted, the court will not order the deft. to bring into court the sum recovered, though the plt. swear he is fearful of losing his debt.

2 Caines' R.  
385, Jackson  
v. Parker.

§ 14. After verdict for the plt., if he neglect to make up the record, the court will permit the deft. to do it.

## CHAPTER CXCV.

### PLEADINGS—COSTS.

#### ART. 1. *Costs.*

§ 1. These appertain both to civil and criminal proceedings. They are also of importance as they respect the rights of parties ;—as they respect pleadings ; and as they respect practice. But costs are taxed not only in very different ways, but on very different principles, in different countries and states ; partly on the principles of the common law, partly on the grounds of statute law, and partly on the score of practice. A mere sketch only of them can be considered in this place. Also costs are allowed in a multitude of cases, in a manner that has made it convenient and proper to mention them in stating the case for other purposes ; the costs often being a condition on which some point has been decided ; as where the party has been allowed to amend, to have a continuance, to replead, &c. &c., paying costs, to which numerous cases no reference can well be had, but by a copious index. In this chapter, costs in Massachusetts will be briefly considered, under several heads ; and then costs in some other States &c., and some few English cases.

3 H. VII.

§ 2. *General principles.* There were no costs in error, at common law ; or in any cases generally, by the name of costs. But in reality costs were allowed as part of the damages, wherever damages were recovered. 3 Bl. Com. 399 ; 9 East, 298, Phillips v. Bacon. To recover costs on the statute of Gloucester, 6 E. I. c. 1, there must be plt. or deft., demandant or tenant.

§ 3. Judgment against two, error brought by one, and CH. 195.  
quashed, the deft. had his costs, because error brought by Art. 1.  
one, was irregular. 8 Mod. 317, *Cowper v. Ginger.*

§ 4. Verdict for the deft. on the first trial, and cause de- 10 East, 417,  
cided for the plt. on a second trial; plt. has his costs of the *Robertson v.*  
second trial;—but otherwise, had the parties made a case after *Liddell.*  
the first verdict, as in that case, the cause being decided for  
the plt., the deft. is found in the wrong.

§ 5. Held, where a case is reserved, and from an insuffi- 3 D. & E.  
cient state thereof, it is necessary to send it down to a second 507, 509,  
trial, and nothing is said as to costs; the party prevailing on *Hankey & al.*  
this second trial, is not entitled to the costs of the first. r. Smith.—  
And it seems to have been held in this case, that where nothing Also *Lick-*  
is said as to costs of the first trial, and they are not reserved *barrow v.*  
to abide the event of the second verdict, the successful party *Mason, 6 D.*  
on the second trial, is not entitled to the costs of the first, as & E. 131.  
*Mason v. Skurry, Doug. 421; Shoolbred v. Nutt; and Hol-*  
*royd cited Kirk v. Nowell, 1 D. & E. 267, to shew this rule*  
obtains as to costs of pleadings, where, if both parties are in  
fault, neither is entitled to costs; as in instances of repleader,  
and where judgment is arrested. 3 Wils. 140.

§ 6. Where there is a covenant for further appearance, as 3 Wood's  
the counsel of B shall advise, and nothing is said about the *Con. 572,*  
costs thereof, the costs must be paid by him to whose use the *573.*  
fine is levied.

§ 7. When the deft. pays money into court on certain 4 D. & E.  
counts, and the plt. takes it out of court, he is entitled to costs 579, *Baillie*  
on those counts only. And the court said, this rule was found- v. *Cazelet.*  
ed on principles of justice. So far only the deft. admits the  
plt's. right of action.

§ 8. If the plt. have a number of counts in his declaration, Doug. 677,  
and have a verdict in his favour, he has costs on all his counts; *Butcher v.*  
verdict was for the plt. on the count for *trover*, and for the *Green, and*  
deflt. on the count for *words*. On this, costs for the deflt. were *notes.*  
moved for; but held, as above. And Buller J. said, the prac-  
tice was uniform, not to allow the deflt. costs in such a case.  
It differed, he said, "from cases where different issues are  
joined, on different pleas; for in those cases, the deflt. is al-  
lowed his costs on the issues found for him."

§ 9. Where a statute gives a certain penalty to the party Salk. 266,  
aggrieved, he shall recover costs also;—but otherwise of a *Shore v.*  
common informer; he has no costs at common law, or on the *Madisten.*  
statute of Gloucester.

§ 10. But if a statute creates and gives certain damages, 3 Salk. 114.  
there are no costs; nor has a common informer any costs, —1 Bac. 519.  
unless specially given.

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## Art. 2.

—3 D. & E.  
634, 636,  
Day v. Hanks.

*Case.* Two counts for disturbing the plt. in two distinct commons. On the first count the deft. suffered a default; and judgment against him, and for costs. On the second count there was an issue joined and found for the deft., and costs for him on this. Though urged by 6 E. l. c. 1, the plt. was entitled to costs of the whole record. *Curia.* Where we see two distinct causes of action on the record, on one of which the plt. succeeds, and the other is found for the deft., we are bound to give two distinct judgments, and so in assault and battery against two defts., if one suffers judgment by default, and the other justifies and obtains a verdict, there must be two separate judgments on the record. Recognised, 8 D. & E. 476.

4 D. & E. 10,  
Stevenson v.  
York.

§ 11. *Paying money into court.* If the deft. pay money into court, and the plt. take it out, and move for costs, he shall have them to that time; but if he goes on to trial, and there is a verdict for the deft., the plt. shall not have the costs to the time of such payment.

8 D. & E.  
486, Loreck v.  
Wright.

§ 12. But the plt. is entitled to the costs to the time the money is so paid in, though he afterwards enters the record for trial, in case he withdraws it.

6 D. & E.  
599, 603,  
Brainswaite  
v. Bradford.

§ 13. A proprietor sued for nine distinct rights, and recovered three of them, and on these issues had costs; and failed on the other six issues, and on these issues the court held he must pay costs.

2 W. Bl. 800,  
Bridges v.  
Raymond;  
and 1199.

§ 14. Held, if the plt. recovers on one of two counts, he has costs, but the defts. have none. So if he has a verdict on one count, he has costs on the whole declaration, though it contain several counts. 2 Bos. & P. 49, *Spicer v. Teasdale*, in the C. P.; but this practice was altered, 334.

ART. 2. *Costs in Massachusetts' statutes.*

Mass. act,  
Oct. 30, 1784.  
—Maine act,  
ch. 59, s. 16.

§ 1 This act provides, that "in all actions, as well those of *qui tam*, as others, the party prevailing, shall be entitled to his legal costs against the other." This is the Province law revised; and on this, as on the provincial statute, our uniform practice has been to tax costs for and against executors, administrators, and wards suing by guardians, and minors suing or defending by them, or next friends, on judgments for or against them.

Mass. act,  
March 11,  
1784.—  
Maine act,  
ch. 59, s. 30.

§ 2. By this act, no action can be sustained in the Common Pleas, "when the debt, or damages demanded shall not exceed £4, unless by an appeal from a justice of the peace, saving such actions wherein the title to real estate may be concerned." And if any action be originally brought in the Common Pleas, and judgment be recovered for no more than £4 debt or damages, the plt. shall have only one quarter part as much costs as debt or damages.

§ 3. This act provides, that in all actions on the case for slanderous words, of assault and battery, for false imprisonment, and malicious prosecution, if the jury assess damages under £4, the plt. has only half as much costs as damages; and in all actions in which the title to real estate is not in question, and the plt. recovers less than £4 damages, he recovers only one fourth part as much costs as damages, "unless, in the opinion of the court, the plt. had reasonable expectation of more than £4 damages;" provided if judgment be on the report of referees, full costs are taxed, though the judgment be under £4, unless the report itself directs otherwise. Now \$20, in all these cases, instead of £4.

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Art. 2.

Mass. act,  
Feb. 13,  
1787.

§ 4. This act, (the Province law revised,) provides, if an unreasonable petition be presented for the sale of the estates of minors, or persons *non compos*, the court may award reasonable costs for such respondents as shall appear, and object &c.

Act March  
12, 1808.—  
Mass. act  
March 4,  
1784.

§ 5. This act provides, if any one or more of the interested parties applying, refuse to pay his part of the costs, on an account, notice, and allowances, the court may issue execution therefor; but not against a party who does not join in the application for partition, *Coffin v. Rowe*, Essex, Supreme Judicial Court, June term, 1789.

Mass. act,  
March 11,  
1784, as to  
partition.—  
Maine act,  
ch. 38, s. 9.

§ 6. But if the respondent appear on record, in partition, costs will be allowed against him. *Palmer v. Downer*, Essex, September, 1802. But in partition the respondent does not pay costs, unless he pleads, or at least appears on record.

§ 7. This act, (*homine replegiando*), provides, if the plt. fail to prosecute, the deft. has costs.

Mass. act,  
Feb. 19,  
1787.

§ 8. By this act it is enacted, that the Supreme Judicial Court, or Court of Sessions, may tax legal costs for justices, officers, assistants, jurors, witnesses, and court charges, where the person accused is tried or not, or whether he be convicted or acquitted, to be paid out of the county treasury, on a copy of the bill of costs, made by the clerk. Witnesses are not to be summoned for the State, but at the request of its attorney.

Mass. act,  
March 8,  
1792—  
Maine act,  
ch. 82, p.  
299, 313.

This act provides, that prisoners, committed for offences against the State, unable to support themselves, be made the charge of the State. The county treasurer advances the charges, and is reimbursed by the State, not exceeding 5s. a week.

Mass. act,  
Feb. 27,  
1795.—Ad-  
ditional  
Maine act,  
ch. 82.

§ 9. In all criminal cases, where the accused is acquitted, the State does not pay costs; but where he is convicted, he is adjudged to pay costs, in all cases, except where there is a judgment of death, or where the costs are included in the forfeiture.

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Art. 3.

Mass. act,  
June 18,  
1799.—Maine act,  
ch. 83.Mass. act,  
June 4, 1802.Mass. act,  
March 7,  
1806.

§ 10. This act authorizes the Supreme Judicial Court and Sessions to dispose of convicts, in service, for costs of prosecution, who have been therefor imprisoned three months, for a term of service not exceeding two years, for payment of such costs. ;—and if such disposal cannot be made, the court may order the sheriff to liberate such convicts, on such terms as shall be deemed best for the State and county.

§ 11. This act enables the Sessions to liberate persons convicted before justices of the peace, in the same manner, and on the same terms, as if convicted before either the Supreme Judicial Court or Sessions.

§ 12. This act authorizes either court to liberate poor convicts, who have been in prison three months for fine and costs only, and having no estate, on their giving their notes to the county for the amount of the fine and costs ; and the Municipal Court in Boston has the same power : March 20, 1818, paid out of the State treasury.

§ 13. There are several other statutes as to costs in particular cases, as *audita querela*, outlawry, probate appeals, forcible entry, defaults, nonsuits, endorsing writs, trustee actions, inquests of office for the State, reviews, disclaimer, actions improperly severed, brought in wrong counties, &c. generally noticed under the respective heads.

§ 14. Legal costs in Massachusetts have ever been regulated by fee bills, in most cases, from time to time. These have been repeatedly varied and altered, according to circumstances ; and whenever costs have been allowed generally, it has been understood, costs taxed according to the existing fee bills.

#### ART. 3. Cases decided in Massachusetts.

Essex, 1795,  
Patch v.  
Patch.

§ 1. Held, costs are attached to the damages, and, therefore, if only damages, as the amount of the rent be referred by rule of court, the referees may settle the costs.

6 Mass. R.  
375, Howe,  
app. v.  
Howe.

§ 2. This was an appeal from a judge of probate's decree, and entered in the Supreme Court of Probate, and the next term the appellant failed to prosecute his appeal, and held, the appellee must file his complaint for affirmation and costs.

Essex, Nov.  
term, 1798,  
Brown v.  
Haverhill.

§ 3. This was a motion for costs on a *mandamus* to the Court of Sessions, in relation to locating a highway ; and the court held, that there were no costs in cases of *mandamus* and *certiorari*.

1 Mass. R.  
15, Denham  
v. Lyon & al.  
and 47.

§ 4. If the plt. recover less than £4, he has only one quarter costs, though it be a trustee action ; and only half as much costs as damages, in false imprisonment, assault, slander, &c.

§ 5. As to costs in error, see Cases in Error, Ch. 137 ; costs in sundry trustee actions, see Trustee Actions, Ch. 192 ;

costs in in cases of ways, see Ways, Ch. 79. Deft's. disclaimer found against him, plt's. costs, Ch. 176, a. 12. Where plt. has costs after default, Wells & al. v. Banister & trustee. **CH. 195. Art. 3.**  
Other single cases in this article.

§ 6. There are no costs where judgment is arrested, unless for the insufficiency of the declaration. **1 Mass. R. 208. 2 Mass. R. 509.**

§ 7. Referees have power over the costs, and the judgment must conform to their report in this respect. **2 Mass. R. 164.**

§ 8. Where the first judgment is reversed in part, the costs stand. As where the plt. recovered damages and full costs; and on the review, he recovered one cent damages. Held, the deft. shall recover the difference of the two sums awarded as damages, and full costs of the review. And as a general rule, where on a review, the first judgment is reversed but in part, the court has no jurisdiction of the costs of the first trial. **3 Mass. R. 234, Lincoln v. Goulding.**

§ 9. New rule, as to costs, adopted by the court. See Beckford v. Page, Ch. 115, a. 7, Costs. Where the plt. sues the maker and endorser &c., Ch. 20, a. 13, Bills &c. **2 Mass. R. 455.**

§ 10. The statute of 1803, c. 155, s. 5, as to costs, extends to actions brought upon fictitious demurrer, as well as those in which there is a verdict in the lower court. So is the statute clearly. Plt. has his costs before the appeal, and the deft. his after. **4 Mass. R. 244, Wightman v. Hastings, jr.**

§ 11. If a *feme sole* plt. marry pending the suit, and the writ abates, on a plea in abatement, she shall pay costs. When the deft. abates the plt's. writ, the deft. is considered as prevailing in the cause; but costs are not allowed to the deft. on a *respondeas ouster*, for then he has not prevailed in the action. Judgment against the wife, and execution is against her in several cases; but on it the husband's body or goods cannot be taken. **4 Mass. R. 659, Haines v. Cortiss, jr.**

§ 12. Motion for a *certiorari* to a justice of the peace, who had fined a soldier of the militia for misbehaviour at a review &c. This being denied, costs were moved for. *Curia*. Were we to grant costs in this case, the only mode to enforce their payment, would be by attachment, on which the party must be committed, and in such case, he must lie in prison until payment, though utterly insolvent. The act for the relief of poor prisoners, not extending to persons so committed. Costs refused, for these reasons. Though implied, the court would have granted them, if they could have issued execution for them. **4 Mass. 565, case of Cushman.**

§ 13. Held, if the Court of Common Pleas refuse to accept a report of referees, on the referee act, for a defect in their authority, no costs can be allowed. It did not appear, for what cause the demand was. "Each party are equally responsible for a defective or irregular submission." **5 Mass. R. 264, Jones in error v. Hacker.**

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Art. 3.

5 Mass. R.  
309, Field &  
al. v. First  
Mass. T.  
Corp.

§ 14. If a mistake arise in taxing a bill of costs, as omitting the travel and attendance of witnesses, not discovered till execution was issued and satisfied; held, the court could not interfere in a summary way, (on petition,) the remedy is by writ of error, assigning for error, this mistake. "If the error be confessed or proved, we can give you relief, by reversing the former judgment, and entering a right one." The former judgment was in this court.

5 Mass. R.  
343, Powell,  
jr. v. Hins-  
dale, jr.

§ 15. *Costs to both parties.* Replevin, issue joined on the plt's. property in the chattels. Jury found property of part in the plt., and part not. Held, each party was entitled to damages and costs. In replevin, said the court, each party is an *actor*; in this case, each party has prevailed; costs taxed for each party; as each also has damages.

7 Mass. R.  
286, Hay-  
ward v.  
Ritchie.

§ 16. This action was referred and continued several terms under the rule of reference; held, the party recovering costs, shall be allowed to tax his travel at the term when the rule is entered into, and his attendance from the commencement of the term, to the day on which the rule is entered into. At the term when the report is made, he may tax his travel and attendance, till accepted, recommitted, or discharged; and at each intermediate term may tax his travel, and one day's attendance.

7 Mass. R.  
467, Moore  
v. Heald.

§ 17. Costs to one quarter the damages, on statute 1807, c. 122, s. 2, recovered in an action, commenced in the Common Pleas, where those damages are less than \$20, does not extend to the reports of referees, and judgments thereon.

7 Mass. R.  
467, Dummer  
v. Foster.

§ 18. In this case, held, the limitation in said statute does not extend to trespass *quare clausum fregit*.

8 Mass. R.  
535, Barnard  
v. Curtis.

§ 19. Where the plt's. demand is reduced below \$20, by a set-off, he has his costs; but otherwise, where the items in the account are proved to have been delivered, and received in part payment of the plt's. demand in the action. In this last case the plt. knows his demand is reduced;—in the other, the set-off is at the deft's. election.

9 Mass. R.  
28, Ham v.  
Ricker.

§ 20. In the Common Pleas the plt. recovered above \$50; the deft. appealed, and in the Supreme Judicial Court the damages were reduced below \$50; the plt. was allowed single costs only.

9 Mass. R.  
126, Lake-  
man v.  
Morse.

§ 21. And where the plt. recovered above \$50 in the Common Pleas, and the deft. appealed; and in the Supreme Judicial Court the plt. recovered under \$20; he was allowed only one quarter as much costs as damages. The action was commenced in the Common Pleas, and was for work and labour.

9 Mass. R.  
372, Reed &  
al. v. Reed.

§ 22. A devise of the income of lands, is, in effect, a devise of the lands. On a petition for partition, the parties

agreed a case for the opinion of the court; held, no costs could be allowed, unless specially agreed, they should await the decision of the cause. Here was no issue in law or fact joined. CH. 195.  
Art. 3.

§ 23. This was a writ of *scire facias* against Heard, as assignee of a bankrupt, to recover costs of a former action, in which he was plt.; he pleaded to the *scire facias*, praying for execution of the former judgment; he had no effects &c. of the bankrupt. Held, the plea was good. The judgment in the first action was against Heard as assignee;—but the court said, it might have been against him personally for the costs. His plea was, he had distributed all the bankrupt's effects among his creditors before the *scire facias* was sued out. 9 Mass. R.  
489, Am-  
blard v.  
Heard, jr.

§ 24. The same plt. brought two actions against the sheriff for the defaults of two of his deputies, in the execution of two several processes. The plt. had full costs in both actions, and held, the 12th section in the act of October 30, 1784, was limited to actions on contracts only, and extended not to actions on torts. 10 Mass. R.  
175, Ripley  
v. Chandler.

§ 25. The plt. in slander laid his damages \$1000, and recovered \$1, in the Common Pleas, and 25 cents costs, and appealed, and failed to prosecute his appeal. On the deft's. complaint, the former judgment was affirmed, and the deft. was allowed full costs. 10 Mass. R.  
179, Weston  
v. Butterfield.

§ 26. This was trespass *quare clausum fregit*, commenced in the Common Pleas. Plea, general issue, and an appeal. Plt. had a verdict for \$5 damages; deft. claimed costs on the act of June 21, 1811, c. 33, establishing the Circuit Courts of Common Pleas. As the plt. appealed, and recovered less than \$100, full costs allowed the plt.; for neither this act, nor that of 1807, c. 122, s. 2, extends to actions wherein the title to real estate is in question; of which *quare clausum* is one. \$20 jurisdiction. 10 Mass. R.  
410, Butter-  
field v. Pear-  
son.  
  
Mass. act,  
March 12;  
1808.

Other cases of costs in Massachusetts' courts, see *Waite v. Garland*, Ch. 137, a. 13; *Galloway v. Pitman & al.*, Ch. 189, a. 3. Sundry cases in error, Ch. 137; *Isley v. Knight*, Ch. 189, a. 3; *Commonwealth v. Carpenter*, Ch. 79, a. 10; *Cleveland v. Clap*, Ch. 192, a. 6, s. 4; Ch. 144, a. 15, s. 24; *Buckfield v. Gorham*, Ch. 53, a. 3, s. 18; *Kennebec Proprietors v. Crossman*, Ch. 143, a. 5, s. 17; *Ruggles & al. v. Ives*, Ch. 175, a. 9; *Hagar v. Weston*; *Treat v. Hathaway*, Ch. 189, a. 3, s. 26; *Swett v. Bussey*, Ch. 191, a. 4, s. 7; *Dawes, Judge v. Gooch*, Ch. 149, a. 2, s. 41.

§ 27. Held, the statute of 1811, c. 33, allowing deft. costs in actions which plts. appeal from judgments of the Circuit Court of Common Pleas, in personal actions, and recover not above \$100 in the Supreme Judicial Court, extends to actions pend- 11 Mass. R.  
340, Billings  
v. Segur.

CH. 195.

Art. 4.

12 Mass. R.  
206,12 Mass. R.  
379, Thomas,  
judge, v  
Sever.12 Mass. R.  
412, Lyman,  
judge, & al.  
v. Warren.12 Mass. R.  
525, Osgood,  
appellant, v.  
Breed.13 Mass. R.  
536, Brown v.  
Stearns & al.1 Johns. Cas.  
32, Bayley's  
case.—3  
Johns. R. 450.  
6 Johns. R.  
332, Moulton  
v. Hubbard.7 Johns. R.  
537, Walsh v.  
Sackrider.

ing at the time the statute was passed. So this statute applies in such case, though the plt's. demand is reduced below \$100, by the def't's. filing his demand as a set-off. But on what principle? Were the items in the def't's. account set-off, furnished to the plt. in part payment?

§ 28. Though several persons endorse the writ on a probate bond, sued by the judge of probate, and he recovers judgment for their benefit, but one bill of costs can be taxed.

§ 29. Auditors have not the power to award costs, referees have: 2. After the forfeiture of the penalty of a bond is confessed, the plt. has his costs; though found on a hearing in equity, nothing is due to him on the bond: 3. The report of auditors appointed to take an account &c., becomes binding and conclusive, if no substantial objection be made to it; though not so in itself. The court appointed the auditors, by consent of parties. "Their power and duty are only to state the account, with vouchers tending to prove, or remarks tending to explain, the items." Costs before the auditors are at the court's discretion, and none allowed.

§ 30. As to costs to the prevailing party in probate causes. Power of a *feme covert* to make a will of lands. Was an appeal as to the probate of her will, by her executor. She cannot, by her deed alone, convey her land, nor is she *sole* seized, nor can she devise them, unless by some power from her husband; and if in making her will, she devise more estate than in her power, her will cannot be proved. She may appoint as to lands, under a proper deed from him. As to costs, the court has a discretionary power in these cases. None allowed, except where the appeal is frivolous, or unfounded, and this known to the appellant. Not the present case.

§ 31. Case for a malicious prosecution. Both defts. pleaded, jointly, not guilty. One was acquitted. Held, he was entitled to his costs; though the other was found guilty.

ART. 4. *Cases of costs in the courts in New York.*

§ 1. Where an attorney of the Supreme Court was sued for a debt less than \$250; held, the plt. might recover full costs against him; but if an attorney sues by an attachment of privilege, for a debt less than \$250, he can recover only the costs in the Common Pleas; and an attorney being sued in the Supreme Court, and plt. recovering under \$25, had no costs; for, by statute, 28 Sess. c. 93, s. 6, attorneys may be sued before justices of the peace, as other persons may be, except during the sitting of the court.

§ 2. But if an attorney of the Supreme Court be sued, and judgment recovered against him for a sum exceeding \$25, but less than \$50, the plt. has full costs.

§ 3. But where an attorney of the Supreme Court was sued, CH. 195. November, 1809, for \$25.93, and had a *set-off* of \$20.25, Art. 4. and the plt. recovered \$5.68; held the deft. was entitled to costs. 8 Johns. R. 123, Willet v. Starr.

§ 4. *Quare clausum fregit*, and for assault and battery: plt. recovered a general verdict for \$10 damages; he was allowed full costs. Plt. recovers less than \$25 in the Common Pleas, by reason of set-off; pays costs.

§ 5. In *trespass* &c. a certificate of the judge, before whom the cause is tried, to entitle the plt. to full costs, may be given after the circuit. 1 Johns. R. 146; 3 Cain. 174.

§ 6. In *trespass*, assault and battery, damages found by the jury under \$5; the judge, notwithstanding the verdict and pleadings, may, in his discretion, refuse a certificate to entitle the plt. to full costs, if he be satisfied, on the evidence, that the assault and battery were not sufficiently proved.

§ 7. In actions of *trespass*, it rests in the discretion of the judge, at the trial, to certify whether the trespass was wilful and malicious, so as to entitle the plt. to full costs; and if he refuse a certificate, the court will not interfere, on an appeal from the decision. The statute intends a trespass done *mala fide*.

§ 8. Where the plt. recovers \$250 *debt*, and damages for the detention, on a single bill, he is entitled to the full costs of the Supreme Court; not if less than \$250, by payments made. 1 Caines' R. 66.

§ 9. Where executors sued in the Supreme Court, and recovered under \$50; held, they were not entitled to recover costs, nor liable to pay costs to the deft.

§ 10. This was an action on the case, for *overflowing* the plt's. land; deft. pleaded *not guilty*, and gave in evidence a permission from the plt. to erect a dam, and *overflow* the land if necessary. The plt. proved a revocation of the license, and the jury found a verdict for the plt. for \$9 damages. Held, the title did not come in question, so as to entitle the plt to full costs under the statute.

§ 11. In covenant in the Supreme Court, for the non-payment of rent reserved in a lease, if the plt. recover under \$250, he is entitled only to the costs of the Common Pleas. 3 Caines' R. 134.

§ 12. But in another action for overflowing the plt's. land, which was a special action on the case, in which the deft. pleaded the general issue, and a justification by right of prescription; the plt. had full costs, though he had a verdict for \$15 only.

§ 13. *Feigned issue*. Cases made for the argument of a cause before the court, are not taxable in the bill of costs; on commissions to examine witnesses; how allowed.

1 Johns. Cas. 126, 214.—  
2 Caines' R. 102, Spalbergh v. Walrod.  
1 Johns. Cas. 221, Towers v. Vieilie.

3 Johns. Cas. 140, Hunt v. Leon.—2 Caines' R. 235, 368.

6 Johns. R. 277, Heath v. M'Inroy—3 East, 495, 500.

2 Johns. Cas. 490, Clap v. Reynolds.

2 Johns. Cas. 209, Mahan's exrs. v. Fuller.

3 Johns. R. Otis v. Hall, 450.—10 Johns. 219.

7 Johns. R. 555, Beecher v. Platt.

2 Johns. R. 185, Eustace v. Tuthill.

2 Johns. R. 107, Kenney v. Vanborne & al.

CH. 195.  
Art. 4.

1 Johns. Cas.  
102, Flem-  
ming v. Tyler.

2 Johns. R.  
377 Kellogg's  
adms. v.  
Wilcocks.—2  
Bos. & P. 253.

8 Johns. R.  
379, Carlisle  
v. Bates.

Johns. Ca.  
190, Cable's  
exrs. v. Long.

6 Johns. R.  
109, Row v.  
Sherwood  
and Hamil-  
ton.

5 Johns. R.  
251, Clark v.  
Dewey.

1 Johns. Cas.,  
236, Leguin  
v. Gouver-  
neur and  
Kemble.

7 Johns. R.  
468, Pease &  
al. v. Morgan.

8 Johns. R.  
321, Low v.  
Rogers.

8 Johns. R.  
236, The  
People v.  
Harden-  
burgh.

§ 14. *New trial*. If a verdict be found against the direction of the judge, and a new trial is granted, the costs abide the event of the suit. 1 Johns. Cas. 279, Van Rensselaer v. Dole.

§ 15. *Executors and administrators*. An executor plt. nonsuited for variance between the declaration and the writing declared on, as offered in evidence, was held to pay costs.

§ 16. So if judgment be given against executors or administrators, plts., on demurrer, they must pay costs. The general rule that governs the English cases, as to executors and administrators, seems to be, that they must pay costs wherever they might have sued in their own right, and wherever they fail for a fault in their pleadings; otherwise they are not liable to costs.

§ 17. An administrator sued on a note given to his intestate for \$90; the jury found a verdict for \$15 for the plt. Held, he could not recover costs, nor was he liable to costs.

§ 18. In this action, the court decided that executors and administrators must pay costs on judgment of nonsuit. It is their own fault, in such a case, the action is brought.

§ 19. *Justice of the peace*. An action for a malicious prosecution was brought against a justice of the peace and another person, in which the defts. pleaded separately; and the plt. was nonsuited. Held, the justice was entitled to *double costs*, and the other deft. to single costs, to be separately taxed: double were by statute.

§ 20. *Qui tam*. In an action *qui tam* on the statute for preventing frauds; no costs can be recovered by either party; 24 Sess. c. 170: by statute, no costs in such case.

§ 21. *Writs of error*. If a judgment, decree, or order of a court below, is *reversed*, on an appeal to the court for the correction of errors, the appellant has costs only in the lower court, and cannot recover costs or damages on the appeal; so no costs in this court on reversal &c. 3 Johns. R. 553.

§ 22. If the plt. recovers in the court below, and on a writ of error, judgment is reversed above, the plt. in error recovers no costs; single costs, if affirmed. 6 Johns. R. 278; act, 24 Sess. c. 170.

§ 23. *Certiorari*. An inquisition was taken under the 20th section of the act, relative to highways (Sess. 24, c. 186) for an encroachment on the highway, and was removed into the Supreme Court by *certiorari*, and quashed. Held, the appellant was not entitled to costs: is a *casus omissus* in the statute as to costs.

§ 24. *Attorney's lien*. The deft. settled the costs in a suit in whose favour they were awarded, with the plt.; this is valid, if made without any notice from the attorney of any *lien*, and without any collusion to deprive him of his costs; and the claim an attorney may have on his client for extra fees or ser-

vices, as for counsel fees &c. make no part of his *lien* on the taxed costs; or which the court will protect against the interference of his client. 3 Caines, 165. CH. 195.  
Art. 4.

§ 25. *Insolvent cases &c.* Two plis. brought an action, one resided out of the state. Held, the attorney is not obliged to file security for costs, where the other plt. is in the state, though he may be insolvent; and 2 Johns. Cas. 67. 2 Johns. Cas. 109.

§ 26. The plt's. discharge under the insolvent act was obtained: the costs on a judgment of nonsuit were taxed after the discharge. Held, the costs were not a debt till taxation, though judgment before; hence the plt. was not discharged of the costs. 2 Johns. Cas. 280, Cone v. Whitaker.

§ 27. One, insolvent, assigned over all his estate for the benefit of his creditors, and a judgment was recovered in the Common Pleas, in his name, for less than \$25, on which a writ of error was brought; the court ordered the assignees to give security for costs, for whose benefit the suit was prosecuted. 4 Johns. R. 484, 485, Ketcham v. Clark.—7 D. & E. 296.

§ 28. Though the deft. is insolvent, the plt. cannot discontinue without costs, unless the deft. has got his discharge: also under the insolvent act. 6 Johns. R. 333, Collins v. Evans.

§ 29. The plt. in *quare clausum* &c. recovered under \$50 damages, and the deft. recovered costs; his taxed costs were allowed to be set off against the damages recovered by the plt., though he was insolvent; the *lien* of the plt. for his costs in the case, extends only to the balance due, after deducting the deft's. charges, and does not affect the equitable right of *set-off* between the parties. 8 Johns. R. 357, Porter v. Lane.

§ 30. *Cause remitted by procedendo.* A cause was removed by *habeas corpus* to the Supreme Court, from the Common Pleas, and the plt. filed his declaration, and entered a rule, but the cause was sent back by *procedendo* for want of bail. Held, the plt. was not entitled to costs in the Supreme Court; plt. nonsuited must pay costs before he proceeds in an action. 1 Johns. Cas. 105, Murray v. Smith.

§ 31. *Judgment for the penalty.* Debt on a bond conditioned to perform covenants; the plt. must assign his breaches, and if his damages be assessed at six cents, he is entitled to nominal damages for the detention of his debt and the costs, and may enter up judgment for the penalty, so as to recover full costs. 2 Johns. Ca. 247. 2 Johns. Cas. 406, Hodges v. Suffelt.

On a motion to change the *venue*, no costs to either party; and if a suit be settled by the parties, no costs to either, unless mentioned. 4 Johns. R. 492.—5 Johns. R. 268,

§ 32. An attorney is liable for using one's name without his consent; as where a person was made lessor in ejectment against his consent, and the nominal plt. was nonsuited. Held, such lessor was not liable for costs, but the attorney for the plt. was. 6 Johns. R. 318, The People v. Bradt.

## CH. 195.

## Art. 4.

8 Johns. R.  
356, 357,  
Austin v.  
Bemiss; not  
on stat. Sess.  
24, c. 90

§ 33. No fees for the travel or attendance of witnesses can be taxed without an affidavit of their actual travel and attendance. 6 Johns. R. 330, Kincard v. Scott.

§ 34. *Separate suits brought.* Where separate actions are brought against the endorser and maker of a note, and separate judgments recovered, the plt. is entitled to the costs in each action; so is the practice in England; see Ch. 120; but it is otherwise in Massachusetts; see Ch. 20. In Pennsylvania, as in New York. 2 Dallas, 115.

1 Stra. 815.

§ 35. It appears very clearly these numerous decisions in the courts in New York, as to costs, depend not on English statutes or practice, but on statutes passed in that State, except in some instances, they rest on those principles of the common law which govern every where, in the absence of express statutes on the points; as the attorney's *lien* and his liability to costs in certain cases.

3 Cain. 174,  
Tower v.  
Wilson.—1  
Johns. Cas.  
221.—2 Cain.  
213.—1 Bin.  
61.

§ 36. The trespass must be *actually wilful*, not by construction, to entitle the plt. to a certificate to enable him to recover full costs &c. Hence one is not granted in an action against a sheriff for the act of his deputy, in *tortiously* taking the property of one person on a *fiery facias* against another, without the sheriff's knowledge.

15 Mass. R.  
178.

§ 37. Writ served, and action entered in the Common Pleas, and the writ being lost, was continued several terms; misentry ordered; on appeal, deft. had costs; was in fact a discontinuance.

5 Taun. R.  
620.

§ 38. *Double and treble costs.* As these are allowed for the plt.'s supposed oppression in suing, a judgment therefor is erroneous which does not show a title to them on the record.

2 Maule &  
Sel. R. 335.

§ 39. The plt. cannot have costs to the time the deft. pays money into court; judgment of nonsuit.

2 Caines' R.  
220, Farring-  
ton v. Ren-  
nie.

§ 40. Plt. in trespass in the Supreme Court recovers less than \$50; not entitled to costs, unless the judge certify the freehold came in question, but comes in question in an action as to way. 1 Johns. R. 146.

2 Caines' R.  
235.

§ 41. Plt. sued for running foul of his vessel, and recovered six cents damages, and six cents costs; he paid costs. Van Colt v. Negas.

3 Caines' R.  
160.

§ 42. Plt. sues A and B; they plead *severally*; A fails, and B succeeds; plt. pays costs to B, and recovers them of A. Tooker v. Bennett & al.

5 Johns. R.—  
1 Caines' R.  
115 —3  
Caines' R.  
126.  
Coleman,  
134.

§ 43. If a judge on the circuit has not time to try a cause, the costs wait the event of the action; if granted to the plt. on the deft.'s putting off a trial, they may so wait, or the plt. may tax them *instantly*, under the court's direction, and go on to trial, if not paid, or resort to attachment.

1 Caines' R.  
152. 252, 364.

§ 44. The sudden indisposition of an attorney, or of counsel,

does not exempt from costs, though an excuse for not going on to trial. *Jackson v. Brown*; and *Russell v. Ball*. CH. 195. Art. 4.

§ 45. If the deft. move for judgment contrary to good faith, he may be held to pay costs of opposing. 1 Caines' R. 252.

§ 46. Deft. has costs, if the plt. give notice of a motion to set aside a judge's certificate, to stay proceedings, and do not attend to argue the matter. But the plt. is entitled to costs for opposing, where, before a Circuit, a cause is referred, and the deft. afterwards apply for judgment, as in the case of a nonsuit for not going to trial. 1 Caines' R. 343. 2 Caines' R. 96.

§ 47. The parties themselves settle their cause, and nothing said about costs, each pays his own, their attorneys knowing nothing of the settlement. *Watson v. Depeyster & al.* 1 Caines' R. 66.

§ 48. If a party can enforce payment of costs by attachment, the court will disregard them in forming an after decision on a collateral matter. 2 Caines' R. 92, *Jackson v. Mason*.

§ 49. A misapprehension of the practice, on a point not settled, excuses costs on stipulation; and if a party be entitled to costs in a first term, he cannot move for them in a second term. *Palmer & al. v. Mulligan & al.* 2 Caines' R. 378.—2 Caines' R. 380.

§ 50. Whenever the jury give damages, costs follow of course, so need not be found by the jury, though it appears the juries in New York often find costs. 3 Caines' R. 81.

§ 51. Action in the Common Pleas, referred by order of the court. The parties had mutual accounts. Report was, that the amount of the respective accounts, proved before the referees, taken together, was \$265,26; balance due the plt. \$16,74; for this sum he had judgment. He had full costs, as the case was above the jurisdiction of a justice, and the referees' certificate was a substitute for the judge's. 9 Johns. R. 224, *Dunham v. Chamberlain*.

§ 52. A justice was sued for an act done in his official capacity. He pleaded the general issue, also justified. Repliation to the second plea, and demurrer: thereon, judgment for him. On the general issue, judgment of *non pros.* obtained, for not going on to trial. Double costs awarded to the deft. on the *non pros.*, but not on the demurrer: 2. After double costs taxed on both issues, part paid, and execution out for the residue, a retaxation was ordered by the court, at the plt's. expense. 9 Johns. R. 254, *Wait v. Durand*.

§ 53. Costs wrongfully received by an officer, may be recovered back; as if a cause be discontinued for want of cause, and there is no decision of the cause, and an officer of the court exact costs of the deft., this is an act in *pais*, and the monies may be so recovered in another court of competent jurisdiction: 2. It belongs exclusively to the court in which an action was originally brought, to award costs. The costs were exacted as a condition to delivering to the party his property seized. 9 Johns. R. 370, *Clinton v. Strong*.

CH. 195. § 54. In dower, where the demandant recovers damages, she is also to have costs of suit : relied on *Dennis v. Dennis*, 2 Art. 5. Saund. 328. 10 Johns. R. 216.

10 Johns. R.  
219, Pearson  
v. Bailey.

§ 55. Debt on a bond \$4800, conditioned to pay, \$1800, in yearly instalments of \$200 each. On the first instalment being due, the plt. sued and recovered it, \$200, and \$49,80 damages. Had full costs.

10 Johns. R.  
302, 304,  
Sing v.  
Annin.

§ 56. *Trespass clausum fregit*, brought in the Common Pleas. Plea, not guilty. Title not in question. Verdict for the plt. ; \$1 damages. Costs for the deft. on the New York act of 1801, (sess. 24, c. 170,) giving costs to the deft. in suits in the Common Pleas, when the plt. does not recover \$25, unless in certain specified cases ; and among others, in actions " concerning any freehold or title to land : " was cognizable by a justice : 2. Judgment for costs for the plt. being entered without the knowledge or assent of the court, was irregular, and the Common Pleas had power to set it aside : 3. Judgment for the defts., costs might be entered as of a preceding term, that is, by relation to the term in which judgment was given, on the report of the referees.

10 Johns. R.  
367.

§ 57. If the plt. discontinue without leave of the court, the deft. cannot recover his costs on motion ; but must treat the discontinuance as a nullity, and get judgment of *non pros.* against the plt.

4 Johns R.  
311.

§ 58. Witnesses from another State, allowed travel only from, and to, the boundary line.

ART. 5. *Costs in the United States courts &c.*

3 Cranch, 73,  
U. States v.  
Hoos.

§ 1. Costs cannot be awarded against the United States. 1 Cranch, 259, this was made a question ; and so 1 Cranch, 318. But on what ground could it be made a question ? And 3 Dallas, 301.

3 Cranch,  
514, Win-  
chester v.  
Jackson.—3  
Wheat. 435,  
below, Mon-  
talet v. Mur-  
ry.—4  
Cranch, 47.

§ 2. If a writ of error be dismissed for want of jurisdiction, costs will be allowed, if the original deft. be also deft. in error. Rule of court,—if error be not assigned according to the rule of court, the writ of error may be dismissed with costs ; and if the plt. in error do not appear, the deft. may have the writ of error dismissed with costs. 3 Cranch, 249. But costs are not given on a reversal of a judgment. Nor if the court has no jurisdiction.

6 Cranch, 86,  
Riddle v.  
Mandeville.

§ 3. On the reversal of a judgment in the court above, and a mandate to the court below, it may award an execution for the costs of the appellant in *that* court.

6 Cranch,  
184, Mc  
Knight v.  
Craig.

§ 4. And in all cases of reversal of a judgment &c., if the Supreme Court of the United States direct the court below to enter judgment for the plt. in error, the lower court will of course enter the judgment with costs of that court.

3 Dallas, 338.

§ 5. Costs of a printed state of the case for the use of the court, refused to be allowed. *Jenning's* case in error.

§ 6. The plt. shall not recover double costs in the Supreme Court, when not entitled to any costs in the court below. 2 Dallas, 183, 184, Scott's case. CH. 195. Art. 6.

The verdict ought to include the costs of the replevin, in an action on the replevin bond. 1 Dallas, 439, 440.

§ 7. If the plt., by execution, levy costs he is not entitled to, the court, in a summary way, will compel him to refund them. No costs where a writ of error is dismissed for want of jurisdiction. 3 Wheaton, 435; 2 Wheaton, 368, Inglee v. Coolidge. 1 Bin 125, Harris v. Fortune.

§ 8. On the law of Virginia, in force in the county of Alexandria, in the District of Columbia, if the first *ca. sa.* be returned *non est*, the second may include the costs of issuing both. The judgment is for costs generally, which includes all the costs belonging to the suit, prior to, or after, judgment. "If costs accrue, the judgment opens to receive them." 3 Cranch, 92, 96, Peyton v. Brooks.

§ 9. *Connecticut.* Plt. has final judgment after abatement and amendment. He recovers no costs prior to the abatement, excepting writ duty and officer's fee. Kirby, 89, Mills v. Bishop.

§ 10. In proceeding by attachment, the plt.'s. bond is good security to prosecute the action. Phelps v. Yeomans. 2 Day's Cas. 227.

§ 11. Judgment is arrested after verdict, because the declaration is not sufficient; no costs either side. Kirby, 89.

§ 12. The court will not tax costs against a plt. prevailing, if he recover in the Circuit Court less than \$500, except where he must have known that he was not entitled to that. 3 Day's Cas. 289, Cottle v. Payne.

#### ART. 6. *English cases on general principles.*

§ 1. A prosecutor shall pay costs, where he makes a groundless and frivolous application for an information in the nature of a *quo warranto*, knowing it to be so. 2 Barr. 780, Rex v. Lewis.

§ 2. *Third trial.* After a *venire de novo* awarded upon an imperfect special verdict, and a new trial granted, after a verdict for the plt. on the second trial, and the jury find again for the plt. on the third trial, he is only entitled to the costs on the third trial, unless it be otherwise expressed in the rule granting the new trial. Decided on the practice of the court; and the court said, the practice of the Common Pleas was different. 1 East, 111, Bird v. Appleton.—And 6 D. & E. 131.—Doug. 437.—3 D. & E. 507.—1 Stra. 300.

A bill of exceptions being no part of the record in the court below, till after judgment, is not to be included in the taxation of the costs there. The judgment below has no regard to it. Millar v. Yarroway. Wherever the plt. would be entitled to costs, the deft. is so reciprocally. Costs cannot be set against costs. 2 Stra. 1208; but see cases, Set-off, Ch. 169, &c. 1 Bos. & P. 32, Gardner v. Bailie.—3 Burr. 1723.

§ 3. Two counts in the declaration. Demurrer to one, and plea to the other. Judgment for the deft. on the former. Verdict against him on the latter. Plt. has costs on the ver- 2 Burr. 1232, Astley v. Young.

CH. 195. dict; but the deft. has not costs on the demurrer; for the plt. having prevailed on one of his counts, was entitled to costs on

Art. 6.

Tempest v.  
Metcalf.

that count, without any deduction to be made on account of the deft's. having gotten judgment upon his demurrer to the other count. 1 Wils. 331. The plt. must have costs if any one issue be found for him. See *Day v. Hanks*: were two distinct causes of action.

2 Dougl. 709,  
Stone v.  
Forsyth.

§ 4. An avowant shall pay costs, on the special avowries found against him; and shall not have costs on the affirmance of a judgment in his favour, on a writ of error. An avowant is a deft. within the 4 and 5 Anne, c. 16.

2 H. Bl. 28,  
Shrubb v.  
Barrett & al.  
A. D. 1792.

§ 5. If there be two defts. in *assumpsit*, and the plt. has judgment against one, by default, and the other obtains a verdict, he has costs, where the judge does not certify there was reasonable cause for making him a deft., according to 8 and 9 W. III. c. 11, s. 1; decided on a rule to shew cause why there should not be a revision of the taxation of costs. It was urged, that 23 H. VIII. c. 15, and 4 Jain. I. c. 3, giving costs to defts., related only to cases in which *all* the defts. had a verdict; but it was answered and resolved, the cases cited for the plt. were cases of *torts*, not contracts; and these being joint, two defts., on one, being sued, one could not have a verdict without proving there was no cause for joining him, where judgment is against the other. The inference is, that this consideration made the judge's certificate as to reasonable cause &c. unnecessary, and that the evidence was in the case itself.

2 Stra. 1005.  
—Barnes,  
139. —3  
Burr. 1284.—  
Salk. 194.

1 Lev. 63.—1  
Siderf. 76.

Demurrer decided for the plt. on one plea, issue found for defts.; both have costs, on double pleadings.

2 D. & E.  
391, 396,  
Duberty v.  
Page & al.

§ 6. As in trespass in the plt's. close, lately part of a waste; the defts. pleaded not guilty; also several justifications; one, a right of common; to this the plt. replied, a right of approving &c. leaving sufficient common: another plea, a right to dig sand and gravel upon the waste. Plt. traversed this. Defts. pleaded also a custom, stating it; replication, a right to enclose this parcel &c. To this replication defts. severally demurred, and joinder. And the plt. had judgment; and afterwards the defts. had verdicts on the issue, as to digging gravel and sand, under the prescriptive right &c. Jury discharged as to the other issues. Plt. had costs on the demurrers; and the defts. on the issue found for them, on the statute of Anne, c. 16, as to double pleadings adopted here. The defts. on the whole record, were entitled to judgment. The 4th section of this act allows the deft. to plead double; this section we have adopted. Sect. 5 provides, "that if such matter shall, on demurrer joined, be adjudged insufficient, costs shall be allowed, at the discretion of the court." Here one

of the def't's. pleas was, indirectly, on demurrer joined, adjudged bad. The court said, before this act, only one plea could be pleaded. This act was an indulgence to plead several pleas, but yet not to the plt's. prejudice. Hence the costs of double pleadings are left to the court's discretion; but this discretion is only as to the *quantum* of costs; and on this sect. 5, the court held, the plt. was entitled to some costs. The pleading double has created the expense by the defts., and it is but just they pay it. Part of the expense is created by the double pleadings themselves.

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§ 7. The Massachusetts lawyer will observe, that all this reasoning applies here generally, but no practice on this sect. 5, is found or recollected in this State; nor is it perceived, that this case is opposed by any thing in our statutes as to costs; for, on a fair construction of them, it has been decided that each party in a suit, may be the prevailing party to some purposes; as in *Lincoln v. Goulding*; *Wightman v. Hastings*, jun.; *Powell, jun. v. Hinsdale, jun.*, art. 3. In this last case, the clerk was directed to tax, for each party, his legal costs; but deduction of those of one from those of the other, or set-off, was not mentioned. In England so deducted. In this State execution may issue for the costs of each party against the other.

§ 8. But in these English cases it was decided, that costs cannot be set against costs; and the court said, an act of Parliament was necessary to enable the courts to off-set mutual debts.

2 Stra. 1203,  
Duthy v.  
Tito & al.;  
and Tito v.  
Duthy.

§ 9. The def't. pleaded in abatement, and the plt. demurred to his plea, and his writ was abated; and the def't. moved for costs on the 8 & 9 W.; but costs were denied, on the ground the statute related only to the merits; and the court said, if the demurrer had been decided for the plt., there had been a *respondeas ouster*, and no costs for him, and so none for the def't. In such case, our law expressly gives costs, and so is our practice; yet costs are allowed on quashing a writ of error, where there were no costs below.

1 Salk. 194,  
Garland v.  
Extend.

§ 10. *Several defts. in torts.* It is believed that no case is to be found, in which the plt's. in the same action have been considered otherwise than one as to costs; even in replevin, where plt's. are, in a degree, acted upon. But every where defts., in a measure forced into the suit, have been divided in regard to costs, in many cases, as to torts and contracts. As in our practice, *Gallaway v. Pitman & al.* above, one def't. in trespass was acquitted, and had his costs, and the other found guilty, paid costs. So in *Row v. Sherwood & Hamilton*, ante, the defts. had separate costs.

1 Stra. 262.

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1 Burr. 358,  
Weller v.  
Goyton & al.  
—1 W. Bl.  
355.

§ 11. The case seems to be much stronger as to actions founded on contracts, for the reason given above, in *Shrubb v. Barrett & al.*; as in cases of contracts there can be no reason whatever for joining in the action, the deft. alone acquitted; but he, in England, cannot have costs, unless he has a verdict, or nonsuits the plt. Nor in *replevin*, on 8 & 9 W. III. c. 11, where alone acquitted, the other deft. being found guilty.

2 Burr. 737.

§ 12. *Several issues—further cases.* Where, in an action or suit, there are several issues joined and tried, or argued, and all found for one party, the costs all belong to that party of course; and the great difficulty, in our practice, arises, only when some of the issues are found or decided for one party, and some for the other. If the rules of practice, in this respect, were clear in England, they would throw but little light on the subject; because these rules and statutes in that country are so very different from those in this State, and our States in general. In England, costs are apportioned and allowed on almost every part of the pleadings, according to the length and importance of each part; but in Massachusetts the party's costs, by a succession of fee bills, from early times, are only for his declaration and writ, his travel, so much a mile, and attendance, so much a day, his attorney's fee, a precise sum in each action, and what the party pays the witnesses, a fixed allowance, each day and mile; and the clerk, court, and officers, according to rates established in these fee bills. Also in England there are numerous motions, rules, served notices, affidavits made by parties, and other steps taken in conducting a cause through court, all creating expenses, and often parts of the costs, and which all have their influence in deciding the question, how costs shall be given in a suit, which various matters are wholly unknown in our practice. For these, and many other reasons, English cases, as to costs, may be well considered in the United States, on two grounds: 1. As being no guide at all in most cases in allowing and taxing costs in this country: 2. As being a guide in some very few cases only, in which the whole question turns on mere principles of the common law, the same in both countries. As to the first, even the Superior Courts at Westminster have ever differed materially among themselves; as may be seen in a vast many of their decisions. Therefore some of our judges did well, when they adopted, as rules of practice, the rules of practice of only one English court of law, the King's Bench. In *Spicer v. Teasdale*, 2 Bos. & P. 49, cited above, the Court of Common Pleas decided, that if the plt. recovered on one count in his declaration, he has costs on all. But soon after, 2 Bos. & P. 330, this court altered its practice, and conformed to the rule in the King's Bench. As a special count on a

*Penson v.*  
*Lee.*

policy ;—another, money had and received ; deft. proved the risk never commenced. Plt. had a verdict for return of premium only. Held, he should have costs but on this last count, and for so much of the expenses of the trial, as were necessarily incurred by him in support of this count ; and that neither party was entitled to costs on the special count. There is no such distinction in our practice. CH. 195.  
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§ 13. As to the second, a few cases may apply here ; as where case for *crim. con.* with the plt's. wife was brought : 1st plea, not guilty, and found for the plt., and £50 damages : 2d plea, not guilty within six years : to this the plt. demurred, and judgment thereon for the deft. The plea was good, each party had judgment ; plt. on his verdict, deft. on his demurrer. Costs were allowed the deft. on his demurrer. But on the trial, no costs to either party. By 8 & 9 W. III. c. 11, defts. have costs against plt. on judgments given for them, upon any demurrer put in by either side. Sect. 5 (4 & 5 Anne) did not apply, as the plea was sufficient. The court seem to have decided this case on general principles ; for the court observed, that the plt. on the whole record considered, had no cause of action, so could have no costs ; and the deft. must certainly have costs of the demurrer ; he was the prevailing party ; but his first plea being found false, he ought not to have costs on that. The same decision would be made in our courts in the same case, with the exception as to different issues hereinafter considered. See *Astley v. Young*, above, two issues, single, at common law, decided on general principles, as would be in our courts. So *Butcher v. Green*, above ; so *Bridges v. Raymond* ; and *Tempest v. Metcalf*, above. 2 Burr. 753,  
Cooke v.  
Sayer.

§ 14. So the principle is the same in both countries ; if the plt. be nonsuited, he must pay costs to the deft. ; but where judgment is arrested, each party generally pays his own costs ; but we have one exception, stated above. C owp. 407,  
Cameron v.  
Reynolds.

§ 15. Costs on a rule of reference are as between party and party ; and not as between attorney and client. This was decided on a reference by rule of court of all matters in difference between the parties, together "with the costs of this action and reference." Held, the referees could report only costs as between party and party, or legal costs ; for the words of reference clearly meant costs in a technical sense. Cowp. 127,  
Marder v.  
Cox.

§ 16. Trespass in the plt's. close, and one count only. Deft. did not plead the general issue, but three pleas of justification of a prescriptive right of way, each. Plt. traversed each, and three issues. He also now assigned other trespasses in this close, as to which he had judgment by default ; *venire* to assess damages on this, also to try the three issues. Jury assessed 1s. damages, as to the damages new 8 D. & E.  
466, Griffith  
v. Davies.

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5 East, 261,  
Postan v.  
Stanway.

assigned and found the issues for the deft. On these he was allowed his costs, on general principles.

§ 17. In this case many of the prior ones were considered by the court, and from them this general rule was extracted, to wit: "that wherever a plt. succeeds on a trial in any part of his demand, divided into different counts in his declaration, whether the deft. have pleaded one plea to all the counts jointly, or pleaded to them separately, and separate issues have been joined, on some of which he has succeeded, yet he never has been allowed costs on that part of the plt's. demand, which has been found against the plt.; and the same rule has prevailed where the deft. has succeeded on a demurrer, as to part of the plt's. demand;" and there is no difference where the plt. himself divides his demand in his counts, and where the deft. severs it by his plea.

In this case the court noticed the three important ancient English statutes as to costs, which were early adopted in several Colonies, to wit: 1. This old statute, which gives the plt. costs in all cases where the party is to recover *damages*: 2. Statute 23 H. VIII. c. 15, which gives the deft. costs in certain actions, where the plt. after the appearance of the deft. is *nonsuited*, or *verdict passes by lawful trial*, against the plt.: 3. Statute 4 Jam. I. c. 3, which gives the deft. judgment to recover his costs, in any action whatever, wherein the plt. or demandant might have costs, (in case judgment should be given for him,) in case of the plt. being *nonsuited*, or verdict passing by any lawful trial against him. Nothing is seen in these rules and statutes repugnant to our law and practice in Massachusetts; but they seem to be a part of the foundation of our law and practice as to costs. The decision made by the court in this action, on these principles, was thus. The plt. brought *assumpsit*; deft. pleaded, 1. Never promised to the whole: 2. Never promised within six years, to the whole: and, 3. As to £15. 15s. part, that the promises were made by the deft's. testator, and one Hassels, jointly, which Hassels survived the testator, and is still living. Plt. joined issue on the two first pleas; and as to the third, replied, the promises as to the £15. 15s. were made by the testator solely, and not by him and Hassels *jointly*, and issue thereon. Verdict for the plt. on the two first issues; and for the deft. on the third. Plt. had judgment for the rest of his damages and costs. Held, the deft. was not entitled to have costs on the third issue found for her, deducted from the costs of the trial, which the plt. was entitled to on the two issues found for him; but otherwise where all the issues at the trial are found for the deft.; but the plt. has judgment on demurrer, and recovers damages on a writ of inquiry. The

Statute of  
Gloucester,  
6 Ed. I. c. 1,  
&c. &c.

court also observed, that this case did not come within the 3 and 4 Anne, c. 16, as to double pleadings; but that the deft's. plea as to the £15. 15s. and issue thereon found for him, reducing the plt's. demand so much, was, in substance, nothing more than the common case, in which the deft. pleads payment of a part of the plt's. demand, and on issue thereon it is found for the deft., reducing the plt's. demand so much; and where he recovers the rest; in which case the deft. never has had costs on the issue found for him.

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§ 18. The principles of this leading case, decided in the year 1804, clearly coincide with the principles of our law and practice in Massachusetts, except in one point, to wit, the plt. in this case, as in *Spicer & Teasdale*, and many English cases, had costs only on the two issues found for, and not on the third issue found against him, and so costs of a part of the expenses, necessarily or properly appertaining to those two issues, and those only, according to the English practice of allowing certain costs on each and every part of the pleadings. But in our practice here, we have no such distinction; if the plt. has costs, he has them on the whole case, as his whole travel, and attendance, his whole attorney's fee, and allowance for all his witnesses, court, officer's, and clerk's fees, he has paid. Indeed it would be utterly impracticable to make this distinction in our practice and on our fee bill. Our costs, in principle and amount, have long been given by statutes, and a fee bill, established by the legislature, to the party prevailing in the suit, and judgment and execution for them generally, against the estate and body of the party to pay them. Our party prevailing, has generally as much right to, and the same remedy for, his costs, as to, and for, his debt or damages; and these costs also as established in the existing fee bill. There does not appear to be the same right and remedy in the English law; but every thing relating to costs is evidently much more in the discretion of the court, though the principles on which costs were allowed in this case, *Postan v. Stanway*, and some few other English cases cited, seems to be generally the same as our own; yet it is conceived, that no English cases as to costs, have much application, or any authority in this State. Even the said statute of Gloucester, giving the party costs, where he recovers *damages*, has but little application, because our law gives costs to the prevailing party, whether he recover damages, lands, or other things.

Still, these English cases have their use here, as they lead American lawyers to attend to principles and distinctions, as to costs, at once, settled by eminent judges, which, in our American practice only, they would scarcely attend to at all.

## CH. 195.

## Art. 7.

2 D. & E.  
235, Dodd v.  
Joddrell.—  
2 H. Bl. 435,  
Brooks v.  
Willet.

§ 19. Where some issues joined in replevin are found for the plt., which entitle him to judgment, and some for the deft., the deft. must be allowed the costs of the issues found for him, out of the general costs of the verdict, unless the judge certify that the plt. had probable cause for pleading the matters on which those issues are joined; and the deft. is entitled not only to the costs of the pleadings which form, but also of the trial of, those issues found in his favour. These cases are according to the practice in our middle States; but only the first part of Dodd v. Joddrell, is according to the practice in New England.

1 D & E. 453,  
The King v.  
Downes.

§ 20. But the above rule in the English practice, by which the plt. is allowed costs only on the issues found for him, does not appear to be adhered to, even generally, in English courts. It has been lately adopted by the Court of Common Pleas; and on informations in the nature of a *quo warranto*, it ever has been wholly disregarded; as, in such information against Downes, eight issues were joined, six of them were found for him, and two against him, and for the prosecutor. Held, on judgment of *ouster*, the prosecutor was entitled to costs on all the issues claimed by counsel, on the 9 Anne, c. 29; but the court appeared to place this allowance on the invariable practice.

1 D & E. 636,  
Gundry v.  
Sturt.

§ 21. So in trespass on lands, and one count only, the deft. justified part in two pleas; and the plt. new assigned without taking issue on the special plea, and had a verdict, and was allowed costs of all the pleadings. This also was decided on the practice.

3 D & E. 657,  
Stodhart v.  
Johnson.

§ 22. *Withdrawing a juror.* So if a juror be withdrawn by consent, neither party has costs, though he be so drawn after money brought into court, in a civil action, whereby the deft. confesses a right of action in the plt. to recover the sum brought in by the deft.

ART. 7. *Costs at the court's discretion.*

§ 1. Where the costs are merely at the discretion of the court, or allowed merely because reasonable, it is immaterial who the nominal parties to the suit are. The real prosecutor &c. may be held to pay costs, though the prosecution or suit be carried on in the name of the king, United States, or State.

3 Burr. 1329,  
Rex v Plunk-  
et, Esq.

§ 2. As where an attachment of contempt of court issued in the king's name against Plunket, for not appearing to give evidence, where *subpœnaed* on the application of Sir Thomas Frederick, (plt. in the action against one Lookup.) Plunket, on examination, cleared himself of the contempt, by swearing it was understood, Frederick was to give special notice to attend &c., and did not &c. The court thought Frederick's complaint against Plunket was groundless and unreasonable;

and must have been known to Frederick, the prosecutor, to be so. The court, "after declaring it to be contrary to their general course and practice, to give costs to persons who had purged themselves of contempts, upon their examination, in consequence of attachments which had been granted against them by the court, on cause shewn; yet thought it ought to be done in this particular instance, because the prosecutor must, within his own knowledge, be satisfied his complaint was ill founded and vexatious;" therefore, "ordered, that Sir Thomas should pay costs to Mr. Plunket."

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Art. 7.

§ 3. In this case the king was the nominal prosecutor, but Frederick the real one. He was ordered to pay costs to the deft. not on any statute or general practice; for that was otherwise; but merely because he was in fault, and it was reasonable, in the court's opinion, he should pay costs. Cases of this kind rest on the general principles of the common law, and are nearly the same in all courts of general jurisdiction; and seem to be as reasonable and well founded as those cases in which such courts fine the offending party, at common law, in a reasonable manner, according to the nature and circumstances of the case, and not on any statute, general established usage, or practice.

§ 4. So in this case the court gave costs for not going on to execute a writ of inquiry, according to notice, saying, it was as reasonable as in case of a trial. No statute or precedent shewn.

2 Stra 728,  
Sutton v.  
Bryan.

§ 5. So in this case, the court refused to order the deft. to pay costs for not going on to trial, to the real prosecutor; because the deft. was not in fault, and it was not reasonable he should pay such costs.

3 Burr 1694,  
Rex v. Righton.

§ 6. So in this case, certain persons, the real prosecutors, moved for a rule on the deft. to shew cause why an information in the nature of a *quo warranto*, should not be granted against him, claiming certain rights as a corporator, in Winchelsea. The court, on his affidavit &c., seeing this was very unreasonable, discharged the rule, and ordered these real prosecutors to pay costs, on the same general principles, and not on any statute or established practice. Indeed, if there be no statute on the subject, but a general practice has grown up, yet the first decision must necessarily be merely on the reasons and circumstances of the case, the way in which practice and usage most commonly begin; and one ground or principle is in the constitution of courts; for every court must have power by punishing with costs &c. to prevent its process from being used to the oppression of the people or subjects; and in many cases if a court could not punish with costs a vexatious use of its process, there would be serious wrongs existing without a

4 Burr. 1963,  
Rex v. Ward  
roper — 1  
Stra 33.

Further  
cases, 2 Stra.  
874, 937, 946,  
— Comb. 225,  
410.— Salk.  
193 — 8 East,  
269.— 2 Keb.  
69, 1013.— 3  
Burr 1468.—  
Salk. 193.—  
Danv. 224.

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remedy, and even without a check, as it is utterly impracticable for the statute law, or established practice, to reach, on any reasonable construction, every vexatious proceeding in the courts of law; and in all vexatious proceedings, the mildest remedies are reasonable costs.

Mass S. J. C.  
—1 Mass. R.  
479, Knapp  
v. Crosby; so  
345, 346.

§ 7. The same general principle has been adopted in this court, in Massachusetts; as where a judgment is reversed for error in fact, the court, according to its discretion and the circumstances of the case, allow costs or not; as where there has been some fault in the party, the court will order him to pay costs, as if he knowingly sue a minor; but no costs if otherwise: so in several of the New York cases; art. 4: so in some Federal cases; art. 5.

1 Bac. Abr.  
524.

§ 8. And generally all delays and contempts by either party, can be remitted or purged, only on payment of costs; and all these matters are within this discretionary power of the courts.

2 Stra. 1048,  
Smith v  
Dunce, q. l.

§ 9. Double or treble costs are not to be understood literally, but thus: if a statute give double costs, the common costs are first calculated, then half the common costs: 2. If treble costs, then first, the common costs; second, half of these, and then half of the latter. 2 Danv. 221; Tidd's Pr. 674, 675; Bac. Abr. Costs, 6 Am. ed.

3 Caines' R.  
133, Jackson  
v. Stile.

§ 10. *Persons demanding costs must be authorized &c.* As where, on a motion for an attachment for not paying them, because the plt. was nonsuited for want of confession of lease, entry, and *ouster*; held, the affidavit must state that the person demanding them of the tenant, was duly authorized by the plt's. lessor &c.

1 Caines' R.  
154, Gilliland  
v. Morrell.

§ 11. In all cases of stipulation, the deft. should demand his costs, with a copy of the rule annexed; and if not paid in twenty days, he may enter judgment of nonsuit; and if he do not so, the plt. may notice for trial.

ART. 8. *Costs in Virginia &c.*

Cocke & Co  
v. Pollock &  
Co. 1 Hen. &  
M. 499, 518.

§ 1. In this State, as in Massachusetts, the general principle is adopted, on which costs must be allowed to the party prevailing. 1 Rev. Code, c. 63, s. 19, p. 63. This case was in the Court of Appeals.

2 Hen. & M.  
587.

§ 2. Held also, the party *substantially prevailing* in the Court of Appeals, is entitled to costs, although *in form* the decision is against him. In this case, held: 2. A bill of review does not lie to a decree foreclosing the equity of redemption of mortgaged lands, before any sale is made &c.; every decree is *interlocutory* till the parties are completely out of court; bill of review dismissed with costs, because brought on a decree *interlocutory*, and not *final*. Same, Mantz v. Headley, 2 Hen. & Mun. 308.

and Allen v.  
Belches & al.  
2 Hen. & M.  
695.

§ 3. Security for costs must be given in ejectment, when the plt's. lessor dies *pendente lite*. Carter v. Washington, 2 CH. 195. Hen. & M. 31. Art. 8.

§ 4. When a decree is entered against an executor's or administrator's *own goods*, and costs taxed, the attorney's fee must be taxed; 2 Hen. & Mun. 26: was for a balance due on the administrator's account. Bar v. Bar, admr.

§ 5. Costs are not to be taxed on overruling or sustaining a motion to *dissolve* an injunction; was on an appeal from the order of a county court, dissolving the appellant's injunction *with costs*. So much of the decree as related to the costs, was reversed *with costs*; and the cause remitted to said county court, to proceed to final judgment; otherwise as to costs where a decree is made on the *final* hearing of the cause; and 2 Washington, 200; see Cogbill v. Cogbill, 2 Hen. & M. 467, a probate cause. Barnett v. Spencer, 2 Hen. & M. 7.

§ 6. When an executor or administrator declares on an *assumpsit* to himself, for transactions after the testator's death, and who is cast in the suit, costs are to be taxed against such executor &c., to be levied on the goods &c. of the testator, in the executor's hands, to be administered, if so much thereof he hath; but if not, then of his own proper goods and chattels. Carr's exr. v. Anderson, 2 Hen. & M. 361.

§ 7. *Costs in Kentucky*,—are, as in Massachusetts, regulated by a general fee-bill, and several statutes on particular subjects; and by this act, it is provided, that in actions of assault and battery, and slander, if the jury find less than forty shillings, the plt. recovers no costs; by an act of 1800, he recovers costs, if the verdict be for him, in all cases of *quare clausum fregit*, and trespass, assault and battery, and slander. Kentucky act of December 19, 1796. Same act.

§ 8. *Non residents*. They cannot sue until they file bonds in the clerk's office, with approved security, being a resident, for the payment of all costs occasioned by their suit, to the opposite party, or to any officer of the court, any of whom may sue the bond for the sum due to him.

## CHAPTER CXCVI.

STATUTES, AS APPLICABLE TO EACH HEAD, CONSIDERED  
UNDER IT.ART. 1. *General principles.*

2 Mod. 301.—  
2 Burr. 803,  
Rex v. Robin-  
son.

4 D. & E.  
202, Rex v.  
Harris.—2  
Salk. 460,  
Greene v.  
Wigg—1  
Saund. 135 a.

12 Mod. 104,  
Rex v. Gluff.  
—11 Mod.  
174, Queen v.  
Dy.

10 Mod. 336.  
—Salk. 460.  
—Cro. Jam.  
644.—1 Saund.  
135 a. Wil-  
liams' Notes.  
2 Hal. P. C.  
192.—1  
Saund. 135,  
Williams'  
Notes.

2 Hawk. P.  
C. 249.

2 Hawk. P.  
C. 251, Page  
v. Harwood.  
—4 D. & E.  
202, Rex v.  
Harris.

1 Lutw.  
215, Ridley v.  
Bell—1  
Saund. 135.

§ 1. If an offence exist at common law, and a statute gives a penalty, the party may be sued or prosecuted on the statute, or at common law.

§ 2. If an offence be antecedently punishable by a common law proceeding, as by indictment, and a statute is passed, which prescribes a particular remedy, there, such particular remedy is *cumulative*, and proceedings may be had at common law, or on the statute, as the offence and remedy at common law still remain.

§ 3. But where a statute prescribes a remedy to be by bill, plaint, or information, or any other particular mode; that mode "must be pursued," and it cannot be by indictment or other mode; hence no indictment lies on the statute of usury in England.

§ 4. Where the statute *creates* and *makes* the offence, no other remedy can be pursued but that which the statute gives, if this give one; as in such case no offence or remedy exists at common law; but all is on the statute.

§ 5. If a statute make that an offence which was not so at common law, or alters the nature of an offence at common law, as by making a *misdemeanour* to become a *felony*, then the indictment must conclude against the form of the statute; for in such case the *felony* &c. exists only by reason of the statute. But such a conclusion will not make good an indictment which does not bring the act or offence prohibited or commanded, within the material words of the statute.

§ 6. But if a statute add a *new penalty* to a common law offence, and the indictment conclude against the form of the statute, but does not bring the offence within its material words, it is good at common law, and the words against the form of the statute shall be rejected as *surplusage*; for the crime and punishment remain at common law, and when these words are stricken out of such an indictment, it becomes an indictment at common law.

§ 7. If a statute refers to a former one, and adopts and continues its provisions, the indictment &c. must conclude against the form of the statute, as it is on that statute revived and kept continued in force till the proceedings are had.

§ 8. If the plt. plead a statute, and the def. says it is repealed, the plt. may reply, that it is revived; and here is no *departure*; and the plt. is within the rule, that requires that the party's pleas must fortify each other; and it is not like declaring at common law, and replying a *custom* or *statute*. CH. 196.  
Art. 1.

§ 9. "When a statute creates a new right, without prescribing a remedy, the common law will furnish an adequate remedy to give effect to the statute right. But when the statute has created a new right, and has also prescribed a remedy for the enjoyment of that right, he who claims the right must pursue the statute remedy." These are two essential principles adopted from the English law in regard to statutes. Imp. Mod. Pr. 43.  
5 Mass. R. 615, Smith v. Drew.

§ 10. *The time a statute begins to operate.* On this day, July 1, Congress passed an act laying an additional impost duty of one hundred per cent. from and after passing the act. Robert Patten & al. gave a customhouse bond *that day*, to pay the impost duties on a cargo *that day* imported into Kennebunk; and on an action on this bond brought by the United States, the district judge in the District of Maine, decided the day the act was passed, was *excluded*, and that it took effect *from and after the first day of July*; and there was an appeal; but the case was finally settled according to his opinion; and this was clearly right; as where it is stated, that if an act of parliament be passed the first day of the session, *to operate from the passing of it*, it operates *from* the day of its passing. This is a reasonable construction, as there *can be no fraction of a day*; the day of passing the act must be *included* or *excluded*, and as a mere *computation of time*, it may be doubtful which, and then the point may be decided on general principles; and it must be much more just to *exclude* the day than to *include* it, especially in *criminal* cases; as to include it, might make many acts innocent, when done or committed, highly criminal; as shipping provisions to the port of A. in the morning of the day war is declared, making that port an enemy's &c. But there may be exceptions to this rule, as where a statute operates as the grant of lands or of a right. Act of Congress, July 1, 1812.  
Patten's case.  
4 D. & E. 660, Latless v. Holmes.

§ 11. *Preamble.* As a statute is to be construed on a view of all its parts, it is material to see what are parts of it; and per Buller J., "the *preamble* cannot control the *enacting* part of a statute, which is expressed in clear and unambiguous terms; but if any doubt arises on the words of the *enacting* part, the *preamble* may be resorted to, to explain it." But the word *so*, in the body of the act, makes the *preamble* a part of the body; so any other words which make a like reference to the preamble. 4 D. & E. 790, Crespi-  
ney v. Witte-  
noon.—Wil-  
les, 395,  
Colehan v.  
Cooke.—  
Lofft, 752,  
Mace v.  
Cammel.

§ 12. In construing a statute, three things are to be considered, the old law, the mischief, and the remedy.

CH. 196. § 13. The several statutes on the same subject, are to be  
 Art. 1. considered together, as all the bankrupt acts, as one system :  
 so the poor laws : so all the statutes in *pari materia*, are to be  
 construed as one law. 1 Burr. 474 ; Dougl. 30 ; Loffi, 371.

1 Bl. Com. 87 § 14. One part of a statute must be construed by another,  
 &c. so as, if possible, the whole may stand, and every part have  
 effect.

Co. Lit. 381. § 15. A saving totally repugnant to the body of the statute,  
 —1 Bl. Com. is void ; as a statute that vests the lands of A, in the king ;  
 87 &c. saving the right of A ; but a saving or proviso may explain  
 the body of it.

1 Burr. 474. § 16. Where a statute acts on the offender and punishes  
 —1 Bl. Com. him, it is to be construed strictly ; for a man is not to be pun-  
 87 &c. ished beyond the strict meaning of the law ; and punishment  
 is not to be extended farther than the law clearly carries it.  
 5 Co. 77, But where the statute is against frauds, it is to be construed  
 Booth's case. liberally ; for in setting aside fraudulent transactions, the statute  
 is remedial ; hence, an act against stealing sheep and other  
 cattle, extends not to stealing other cattle ; but the act of 13  
 Eliz. against defrauding creditors, extends to defrauding the  
 king of a forfeiture.

§ 17. Where two laws cannot stand together, the latter  
 law prevails ; as where the latter law enacts, that a jury shall  
 have twenty marks, and the former law enacted, that he have  
 £20 property, this first law is at an end. But if both statutes  
 are merely affirmative, and the substance such, that both may  
 stand together, here the latter statute does not repeal the form-  
 er ; as where one punishes an offence in one court, and the  
 other in another ; and especially if the former be particular,  
 and the latter general ; as the 7 Geo. III. exempted from  
 taxes certain houses and lands on the river Thames ; 27 Geo.  
 III. lay a general land tax on houses and lands, and its words  
 included these lands &c., yet the court held, they could not  
 be taxed in this general tax. On the whole, it was inferred,  
 it never could be in the intention of the legislature, by this  
 general law, yearly passed, merely to raise a revenue, to re-  
 peal this particular law, passed on purpose (among other  
 things) to exempt these houses and lands from taxation.

§ 18. Title of a statute is no part of it ; nor need it be  
 stated in a declaration or plea ; yet it is a name given to the  
 statute by the legislature, and if set out wrong the error is  
 fatal. 1 W. Bl. 95, Rex v. Williams.

§ 19. Statutes are to be expounded by the rules and rea-  
 sons of the common law ; and though the words of a statute  
 be general, yet they shall be specially construed, to avoid an  
 apparent injury ; and laws, civil and criminal, are prescriptive,  
 and cannot have a retroactive effect.

Salk. 689,  
 Wilkins v.  
 Mills.—3  
 Salk. 331,  
 same case.

8 Mod. 7. 8.  
 —10 Mod.  
 345, 379.—  
 11 Mod. 149.  
 —10 Johns.  
 R. 579.—7  
 Johns. R. 477.

§ 20. Where the legislature revises the laws on any subject, and evidently intends a general revision, the former laws or acts revised, are impliedly repealed. The rule is plain and clear; but the question will repeatedly occur,—Did the legislature intend a general revision, so as to leave none of the former statutes in force? Statutes are not presumed to alter the common law otherwise than is clearly expressed; if so intended, would be expressed in the act. 11 Mod. 149.

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§ 21. An act prohibiting "other entertainments of the stage," does not extend to tumbling, invented after the act was passed; and Lord Kenyon C. J. said, "this is a penal act of parliament, and we cannot extend it to entertainments that did not exist when the statute was made."

6 D. & E.  
286, 288, Rex  
v. Handy.

§ 22. *Where words in a statute may be disregarded.* As where some unreasonable matter arises out of general words in a statute, the judges may suppose the consequences not foreseen, and, *quoad hoc*, disregard it; as where a judge is appointed to try all causes in A, yet the act shall not be construed to authorize him to try his own cause; but if the act expressly say, he shall try his own cause, there can be no power (in England) to set it aside; or perhaps any where, unless there be some provision in the constitution to control the legislature in this respect.

1 Bl. Com. 91.

§ 23. "If a statute, that repeals another, is itself repealed afterwards, the first statute is hereby revived, without any formal words for that purpose." Must be some exceptions.

§ 24. Statutes that favour the liberty of the subject, ought to be favourably construed.

Lofft, 649.

§ 25. If a sentence be made final by statute or otherwise, it is to be understood with the reserve, if not palpably unjust or illegal on the face of it.

Lofft, 189.

§ 26. Where an act of parliament directs a thing of a public nature, *may* is understood as *shall*.

2 Salk. 609,  
Queen v. Bar-  
low.

§ 27. *Near*, in a penal statute, is construed strictly, yet is not equivalent to *next*.

1 W. Bl. 20,  
The King v.  
Harvey.

§ 28. If a statute make certain provisions in favour of persons absconded, it is sufficient for one to avail himself of it, to shew he absconded before the act was passed.

2 Ld. Raym.  
967, Clarkson  
v. Bussey.

§ 29. The court cannot officially take notice of a private act of parliament. It decides what is a statute.

3 Salk. 330.  
—Co. Lit. 99.

§ 30. Presumption of a general meaning, not expressed, nor naturally implied, is very unfavourable, and not to be received, at least on penal statutes; and "an obscure statute ought to be construed according to the rules of the common law."

Lofft, 529,  
Whitebread  
v. Brooks-  
banks.—Bac.  
Abr. 384.

§ 31. If a statute limit the proceeding against one, to six months after the act done, the day on which it is done, is to

2 Dougl. 463,  
Rex v. Ad-  
derly.

CH. 196. be computed one of the six months. This limits the time of  
 Art. 1. prosecuting in favour of the accused.

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 Lofft. 401,  
 416, Bernard  
 & al. v.  
 Winchester.

2 Ld. Raym.  
 1232, Regina  
 v. Bailiffs &  
 al. of Ips-  
 wich.

1 D. & E. 728,  
 Rex v. Hogg.

3 D. & E. 364.  
 —U. States v.  
 Heth,  
 3 Cranch,  
 399, 414.

2 Stra. 828,  
 The King v.  
 Mallard.

2 Ins. 486.—  
 Per Holt,  
 Mod. 101, 26,  
 27.—1 Com.  
 D. 318.

Lutw. 1548.—  
 Dyer, 83 b,  
 85 a, b.—  
 —1 Com. D.  
 318.

Lutw. 1548,  
 1093.—1  
 Com. D. 318,  
 319.—5 Com.  
 D. 694.

2 H. Bl. 620.

§ 32. The principles of the common law govern in the construction of private statutes; and are applied to the subject matter, as in the construction of a private deed or conveyance.

§ 33. Though a statute, on authorizing the doing of a particular act, name a quorum, it is not necessary the persons named in it should expressly consent to it; for it is enough if they be present when it is done. An officer *ad libitum* shall have a peremptory *mandamus*, if an insufficient cause of removal be returned, and it must be directed as the first was.

§ 34. Whenever the words of a statute are doubtful, general usage may be called in to explain them. But where they are clear, the usage of a particular place cannot control them.

§ 35. The words of a statute, if doubtful, ought to be taken most strongly against the law makers. Words taken most strongly *contra proferentem*.

§ 36. A long and uninterrupted practice under a statute, is good evidence of its construction. This case does not make the distinction of doubtful and clear. 5 Cranch, 22, *Mc Keen v. Delancy*.

§ 37. If there be no appropriation of a statute penalty, it is a debt due to the king, and suable in a court of revenue, and not by indictment.

§ 38. If a statute provide a remedy for a party aggrieved, though it do not give any express penalty or forfeiture, he may have an action on the statute; and in every case, where a statute enacts, or prohibits a thing for the benefit of a person, he shall have a remedy upon the statute, for the thing enacted for his advantage, or for the recompense of the wrong done to him, contrary to the same statute.

§ 39. Though an action lies for an offence at common law, yet if a statute is enacted against the same offence, an action on the statute must recite it; otherwise it will not appear whether upon it, or at common law. But if a statute merely extend a remedy, which was at common law, in some particulars, it need not be recited; as in waste against tenant in dower or guardian, the statute need not be recited; for there was a prohibition of waste against them at common law.

§ 40. If a statute give the form of the writ, it need not be recited, adopting this form is sufficient: so if the action be not founded directly on the statute, but upon some collateral fact, the statute need not be recited; and it is enough to recite the sense, though not the exact words of a statute.

§ 41. Statutes "are to be so construed as to include all the necessary means of executing them with effect;" as one giving a power to recover debts, includes a power to arrest.

**ART. 2. Repeal of statutes &c. the effect.**

CH. 196.

§ 1. No proceedings can be had under a repealed statute, though commenced before the repeal, unless by special exception; but s. 7; 1 W. Bl. 451, Miller's case.

Art. 2.

§ 2. It is a general principle, that subsequent statutes, which only add accumulative penalties, do not repeal former statutes; hence, 28 Ed. I. c. 20, as to making plate, is not repealed by any of the subsequent statutes against the same offence; they only add cumulative penalties.

Cowp. 297,  
Rex v. Jackson.

§ 3. If a statute be revived, all acts explanatory of it are revived; not repealed by *non user*. 2 D. & E. 275.

2 Burr. 47—  
3 D. & E. 364.

§ 4. The bare recital in a subsequent statute, is not sufficient to repeal the positive provisions of the former one.

2 D. & E. 365,  
Dore v. Gray.

Where a statute professes to repeal a former one absolutely, and substitutes other provisions on the same subject, which are limited to continue only to a certain time, the prior law does not revive after the repealing statute is spent, unless the intention of the legislature to that effect, be expressed.

3 East, 205,  
Warren q. l.  
v. Windle.

§ 5. If a statute expire, and afterwards be again revived by another statute, the law derives its force from the first.

4 D. & E. 109,  
Shipman q. l.  
v. Heubest.

§ 6. If a statute declare a contract void, that contract is not revived by the statute's being repealed. This was an action on a contract of insurance of tickets against a positive statute, 19 Geo. III., repealed 22 Geo. III. A contract void when made, is always so.

1 H. Bl. 65,  
Jacques v.  
Withy.

§ 7. If a temporary statute give the subject certain benefits, which can only be accomplished by regular proceedings, that require time, if those proceedings be regularly commenced, but not completed when the statute is repealed, they shall be allowed to be completed, as if the statute were still in force: where revived, though some days after expired.

2 Burr. 901,  
Young v.  
Aimes, 799,  
747.

A statute introductive of a new qualification as to the subject matter, though penned in the affirmative, repeals a former statute as to the same matter; as where a former statute only requires a seamen to enter a whaling vessel, in a whaling business, to be exempt from impressment; and the after statute requires something more, as that his name also be inserted in a list: decided on *habeas corpus*.

9 East, 44,  
47, Caruther's  
case.

§ 8. Wherever the subsequent statute is not consistent with the former, that is repealed, though the words be affirmative; but not if the two can be reconciled. By the repeal of a repealing statute, the first is revived, and the repealing act becomes of no force. So far as the latter part of a statute is repugnant to a former part of it, this former part is repealed; but the repugnancy must be clear; but the repeal by implication, of a former, by a latter statute, is not favoured. It is a maxim, an affirmative statute does not repeal, or take away the common law.

12 Co. 8.—4  
Bac. Abr. 638.  
—11 Co. 61,  
63.—Fitzg.  
195.—10  
Mod. 118.—  
2 Inst. 200.

CH. 196. ART. 3. *Exceptions in statutes.*

Art. 3. § 1. Where an exception is in the enacting clause of a statute, giving a right or a forfeiture, the party suing for the right or forfeiture, must negative the exception in his declaration. As in a *scire facias* on a judgment against a person who had been twice a bankrupt, under 5 Geo. II. c. 30, s. 9, which provides, "that the future estate and effects of such person shall be liable to his creditors, unless the estate shall produce sufficient to pay 15s. in the pound" &c., it is necessary for the plt. to aver, that the bankrupt's estate has not produced 15s. in the pound. It will be observed, that this clause makes but one sentence, and the words, *unless* &c., though by way of exception, make an essential part of the plt's. title. To declare on the clause without those words, would be to misstate entirely the meaning of the legislature. See a. 6, s. 17.

§ 2. The distinction is where the exception is incorporated with the clause; there he who pleads the clause, must take notice of, and answer the exception; and where the exception follows in a distinct clause. Hence, where, by the proviso in a statute, a person is excepted within such circumstances, and not in the body of it, the plt. need not shew that he is not within the exceptions; for that shall come from the other party. But if the proviso be parcel, it is misrecital to omit it.

§ 3. Conviction on 1 Jam. I. c. 22, s. 7, as to buying rough hides. Sect. 5 enacted, that no person shall tan &c., "except such person or persons as had a tanhouse" on &c.; "and except such as have been, or hereafter shall be, brought up, instructed," &c.; also other exceptions, on pain of forfeiture of all such leather &c. The information alleged, that after passing the act, the deft. "not being such a person, as by virtue of said act of Parliament, may lawfully use the craft or mystery of tanning of leather, and doth tan the same, and not being such person as doth tan the same," did bargain, buy, &c. Deft. excepted to this information, that it did not negative the exceptions contained in the enacting clause, sect. 5; admitted to be fatal, and held "the distinction had always been allowed between an exception in the enacting clause, creating the forfeiture, and a subsequent proviso in the statute." See art. 8, Teel v. Fonda; the same if the exceptions be in subsequent statutes &c. 1 D. & E. 322, Rex v. Hall.


There is a difference between the cases where the proviso, or exception, in a statute, is matter of fact, and where matter of law. Where of fact, it may be given in evidence, according to the *proviso*, or exception in the statute; but where matter of law, it must be pleaded as a license given on

7 D. & E. 27,  
Gill v. Scri-  
vens.—1 D. &  
E. 141, Spei-  
res v. Park-  
er.—See Ch.  
218, a. 7.

1 Ld. Raym.  
120, Jones v.  
Aren.—Am.  
Preced. 64,  
a. 6, s. 17.—  
1 Com. D.  
313.—1 Lev.  
26.—4 Bac.  
656.

6 D. & E.  
559, Rex v.  
Pratten.—1  
D. & E. 141.

Bul. N. P.  
225.

the proviso &c. For when matter of law, it must be pleaded CH. 196.  
 that the proper judges may decide the matter in question. Art. 4.  
 And if an informer negative exceptions, he need not; it is but   
 surplusage. 1 D. & E. 322, Rex v. Hall.

ART. 4. *Prior law how affected by a new statute.*

§ 1. This is a matter that requires much attention; though on this subject there are many general rules, they have their exceptions, and all liable to be controlled by the great fundamental rule, which is, that the intention of the legislature must govern in every construction.

§ 2. It is a general rule, that an affirmative statute does not repeal the prior law. But there are exceptions to this rule; as where it appears the legislature meant to repeal it, as in altering the juror's qualification as to property, from £20 to 20 marks. So if the affirmative statute vary the case, as in Caruther's case, above. So where the legislature passes an affirmative act, but clearly intends completely to revise all the former acts.

§ 3. So if an affirmative statute, introductive of a new law, direct a thing to be done in a certain manner, that thing shall not be done in any other manner; though there be no negative words. "For the rule is, that affirmatives in statutes, that introduce new laws, do imply a negative of all that is not in the purview." As where an affirmative statute appoints a possession to be in a certain manner and form, it implies a negative, that it shall not be in any other manner or form. Plow. 206,  
Stradling v.  
Morgan.—  
Hob. 298,  
Slade v.  
Drake.

§ 4. So if an affirmative statute give a new power to a certain person, by designating him, all others are in general excluded from the exercise of the power, though the statute be in the affirmative; because, "*enclusio unius est exclusio alterius.*" So 31 E. III. c. 12, provides, "that error in the Exchequer Chamber shall be amended before the chancellor and treasurer; such error cannot be amended before other persons; yet this is an affirmative statute. So where justices of the peace are appointed judges to act in forcible entry; though, by an affirmative statute, no others can act. Foster's case,  
11 Co. 57.

§ 5. But where a statute gives a power to one to do a thing, another is excluded merely because the power is not given to him. Still the question returns, how does a new statute abolish a prior law; as that may be in force, though a new law is made on the subject; and is binding as an affirmative statute; leaving, however, the party to make his election to proceed on such statute, or on the common law. As statute 2 Westminster, c. 2, s. 39, enacts, "that 4 Bac. Abr.  
641.  
 after complaint made to the sheriff, he may take the *posse comitatus*, and make replevin." "Notwithstanding this statute, he may take the *posse comitatus* to serve any process with, as

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Art. 4.



III. c. 11, enacts, "the pannel of assize shall be arrayed four days before the day of assize;" yet, if this be done two days before the assize, it is good ; for two days were sufficient at the common law,—not taken away by this affirmative statute. Yet it seems, according to *Stradling v. Morgan*, *Slade v. Drake*, *Foster's case*, &c., the prescribing four days, implied a negative of the two. As it prescribed a thing to be done in a certain manner, leaving an implication, at least, it was to be done in that only, and not in any other. And why were the *four* days prescribed, if any and every one was at his election to act on the prior law, fixing *two* days ?

Foster's case,  
11 Co. 64.

§ 6. In this case also it is said, that designating a certain person to do a thing, by some new power given by an affirmative statute, does not always exclude another, who was by a precedent law authorized to do the same thing ; as where 8 H. VIII, c. 16, authorized two crown officers to make certain leases ; and 32 H. VIII. c. 40, authorizes another officer to do the same thing, still the two former may act. Here no implication to take away their power is perceived.

2 Stra. 1123,  
*Rex v. Sparrow & al.*

§ 7. By the prior law, overseers of the poor might be appointed at any time within the year. Then 43 El. c. 2, directed, on a penalty, they be appointed in a certain month : they were appointed after the month, and the appointment was adjudged good. The court observed, the penalty shew the appointment was meant to be enforced, and in a certain time, but not to make one after void. And also that this act respected the poor, so to be construed liberally ; and "though it is a new law, yet against the justice and meaning of it no negative shall be implied ;" and there are none, in fact. "It is considerable, that this is a thing which it is not in the power of the parish to procure, and is therefore a construction *ex necessitate*."

4 Bac. Abr.  
642, 643.

§ 8. But "a negative does so bind the common law, that a man cannot afterwards make use thereof;" and it has been adjudged, that no prescription or custom is good against a negative statute, whether it be declaratory of the common law, or introductive of a new one.

§ 9. Many other cases applicable to this article, have been considered in prior chapters, involved in other matters, especially Ch. 148, Ch. 91, cases, *Quarles v. Quarles* ; *Rust v. Low*, &c. &c. ; and many more might be here added, but after all the cases in the books are examined, we are, in each instance, brought to consider the great fundamental question,—What did the legislature mean in passing the new statute ? Did it mean to repeal or take away any former laws, and if any,

what law or laws, or did it intend the new statute as merely *cumulative*, or merely *directory*; in whole, or in part? The principles of decision adopted by courts, in the cases already stated, shew how wide a field of reasoning and construction we are led into, in various instances, in which cases of this sort arise. Two in particular, in *Rex v. Sparrow & al.*, deserve notice. There, in a doubtful case, 1. Assumed, as the new statute respected the poor, it must have a liberal construction: 2. The time of appointment must have a liberal extension; because the parish had no control over it.

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§ 10. In short, the construction of the new statute, and the question, whether it added to, repealed, took away, or varied the prior law or not, must, after all, depend principally upon the wording of the statute itself, and upon taking fully into view all the circumstances the legislators had contemplated when they passed the new statute, to be construed.

§ 11. And the true rule was stated by Coke, justice, in this case. Speaking of the treason act, 25 E. III. he observed, "notwithstanding a statute, that increases the punishment beyond what it was at the common law, ought not to be extended by an equitable construction, yet the words, even of such a statute, ought to be construed according to the true intention of the makers thereof."

Plow. 86,  
Strong v.  
Croker.

§ 12. So in this case, the court said "however true it may in general be, that penal laws are to be construed strictly, yet even in the construction of these, the intention of the legislators ought to be regarded."

3 Co. 7, Hey-  
don's case.—  
8 Mod. 65.—  
4 Bac. Abr.  
651.

§ 13. So the 7 H. VII. c. 1, and 3 H. VIII. c. 1, made the departure of a soldier from his captain, without license, felony. Held, one departing from his conductor, without license, to whom he was delivered to be brought to the sea side, was felony; for a conductor is a captain within the meaning of these statutes; and that a penal statute, when made for the public good, and service of the king and realm, ought to be construed according to the intention of the makers thereof. So is *Poulter's case*, 11 Co. 34; 2 Brown, 110, 111, 116; Plow. 36, 59; 10 Mod. 117, 282; *Hammond v. Webb*; *Attorney General v. Sudill*, Prec. in Ch. 214.

Cro. Car. 71,  
The Soldier's  
case.

§ 14. So in the multitude of cases in Coke's Reports, in which statutes were construed, the material question was, what was the intention of the legislature? To find this, recourse was had to every part of the statute to be construed; also to external reasons and circumstances; as to the prior laws, their defects; the existing evils, new remedies necessary, when the act passed &c. Indeed, often in construing a statute, the judges have inquired into the religious and moral state of the country. For instance, in construing the statute

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of 23 H. VIII. before stated, allowing gifts to charitable, and forbidding them to superstitious uses, they have invariably inquired into the principles of the Protestant, and of the Roman Catholic religions; and of the morality connected with each, in order to find what institutions, what teachings &c., were of a superstitious,—what of a pious or charitable kind, so as to construe and apply this statute accordingly.

ART. 5. *Construction of statutes.*

§ 1. So many cases have already been stated in relation to the construction of statutes, that it will be not necessary to add many in this article.

§ 2. It has been already stated, that the great fundamental rule in construing statutes, is the intention of the legislature in making them. Several cases have been cited, especially in the last article, to establish this rule, if it need cases to establish it; this rule, well attended to, will show how useless many of the detached rules and data, on this subject, are found dispersed throughout our law books. Indeed all the numerous rules laid down on this subject are, in a good measure, useless, except where the *meaning of a statute is doubtful*; then, and then only, can courts of law look to consequences in construing it; for, as stated in this case, and correctly, *where the meaning is plain, no consequences are to be regarded therein; for this would be assuming legislative authority.*

10 Mod. 344,  
The Queen v.  
Simpson.

Vaug. 160,  
170, Shep-  
herd v. Gos-  
nold.—14  
Mass. R. 92.  
Words in a  
statute must  
be explained  
in reference  
to the subject  
matter, as  
used by ele-  
mentary and  
other law  
writers.—1  
Day's Ca. 111.

§ 3. So it may be observed as to *usage*; if the words and meaning of a statute be doubtful, *usage* in construing it, and especially near the time it was enacted, may be resorted to, as then it may be presumed the prior law, the mischief, and the remedy intended, were well attended to, and understood. But if the *usage* has been to construe the plain meaning of a statute contrary, or to give it a meaning different from its plain true meaning, then this usage is not to be regarded; such usage not being according to, but different from, the statute, and so wholly unauthorized. *Courtney v. Bower*, 1 Lord Raym. 388.

§ 4. These positions, founded in the first principles of law, relating to this subject, being thus stated, the few rules to be laid down here, will be with reference to *doubtful* statutes only, or those whose meaning is ambiguous.

*Near*, in a sta-  
tute, does not  
mean *near*.  
*est*; 1 Caines'  
R. 177.

§ 5. 1st. No statute ought to be so construed as to defeat its own end; *Hob. 97*; nor so as to operate against reason; *Carth. 136*; nor so as to punish or damnify the innocent; 1 *Inst. 360*; nor so as to delay justice; 2 *Inst. 611*; nor so as to extend a *new* remedy, or a *new* jurisdiction; 2 *Sid. 63*, *Pool v. Neil*; *Stra. 258*, *Pierce v. Hopper*; especially if it be a *summary* jurisdiction, as that exercised by the commissioners of excise &c.; *Bunb. 106*, *Warwick v. White*.

§ 6. 2d. *A statute is to be construed equitably, where, to construe it rigidly, would be cruel, hard, or unjust*; and to include a case not intended by the maker of it, to be within it; as where the 2 Westm. c. 11, enacted, that bailiffs &c. found in arrear in their accounts, should be committed to goal; this act is not to be construed to extend to an infant bailiff, so as to commit him; for by reason of his want of discretion, he is not to be so punished; in other words, the legislature did not mean to extend this punishment to him, though within the words of the act. So if a law be made that, whoever does an act shall suffer death; but a madman doing it, will not be so punished, for the same reason; but if it be done by a drunken man, he must suffer death, for his case is within the reason of the statute. Indeed some hold he ought to be doubly punished; must mean for the crime and for being drunk.

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Statutes giving a summary mode of recovery, are to be construed strictly. 3 Caines' R. 259.

Plow. 465,  
Zouch v. Howell;  
Eyston v. Studd, Plow. 19.

§ 7. So a statute that gives an action for or against executors, is to be construed to extend to administrators; because within the equity, more properly within the reason of the statute; and a statute may be thus extended to cases not named in it, but the same in principle as those that are; and it is understood the legislature cannot conveniently name in the statute all the cases to which it is intended to extend.

Plow. 467,  
Eyston v. Studd.

§ 8. So a statute shall not have an equitable, liberal, or enlarged construction, so as to take away a common law remedy, or so as to overturn an estate; or so as to extend to a mischief which very rarely happens; as the legislature cannot be supposed to mean either, where neither is expressed or fairly implied.

10 Mod. 282.  
—Vaug. 373,  
Bolt v. Horton.—3 Lev. 133.

§ 9. So if one break prison, which is on fire, though within the letter, he is not within the meaning of the statute against breaking prisons. If a statute seem to give a *summary* process, also the *usual course* of proceeding, the latter is to be preferred.

Plow. 13,  
Raniger v. Fogassa.—3 Caines' R. 459.

§ 10. *Expressions in statutes of a settled meaning.* Every crime is a *felony*, the perpetrator of which, by the statute, is to have judgment of *death* or *member*, though the word *felony* is not mentioned in the statute. But if a statute prohibit an offence or forfeiture of all one's estate, or of body and goods, it amounts only to a high misdemeanour; or so if a statute give a penalty, to be recovered before justices of the peace, and names no mode of recovering it, the proper mode is by indictment; so whenever a power is given to *inquire, hear, and determine*, in a statute, it is to be according to the course of the common law, by jury and by indictment. And the reasons in all these, as in many other cases, are these expressions, in time, by being often used in statutes, and so construed, have acquired their meaning in each case in England and America; not in other coun-

1 Inst. 391.—  
2 Inst. 434.  
Hob. 270,  
293.—3 Inst.  
245.—1 Haw.  
107.—4 Inst.  
171.—Salk.  
606.

CH. 196. tries. Penalties must be created by the express words of an  
 Art. 5. act; cannot be implied. 2 Johns. R. 455.

§ 11. 4th. With regard to the different parts of a statute, there is one general rule of construction; that is, the construction of each and every part must be made on a full view of the whole statute; and every part must have force and effect, if possible; for the meaning of every part is found in its connexions with the other parts; and it cannot be believed the legislature intended any part of the statute should be without a meaning, or without force or effect. These rules are not peculiar to statutes, but hold in regard to wills, deeds, and all instruments where the question is, What did the maker mean. Each ought to be so construed, if it can be, as to prevent any clause, sentence, or word, being superfluous, void, or insignificant; for this obvious reason, no maker of either can be supposed to mean that any part, clause, or word, shall be insignificant, superfluous, or void. It is said, in many English books, that the title of a statute is no part of it, because the clerk adds it. This reason does not hold in the United States, where the legislature makes the title, as much as the preamble or body of the statute. Still, however, here, neither is the title nor the preamble intended as a part of the enacted law; one is meant merely as a name, and the other as a declaration, of the mischief intended to be remedied; sometimes the manner of the remedy, and sometimes a recital of defects in the prior laws; but, most generally, as a mere declaration of motives existing for enacting the law. But it is rare indeed, the preamble embraces all the motives, or even those mentioned with much minute precision; and in this case, the court said, the "general words in the enacting part of the statute shall never be restrained by any words introducing that part; for it is no rule, in the exposition of statutes, to confine the general words of the enacting part to any particular words, either introducing it, or to any such words, even in the preamble itself."

8 Mod. 135,  
 The King v.  
 Athoe.

§ 12. 5th. *The common law is to be regarded in the construction of statutes.* This is a good general rule; but it embraces too many considerations, to be of much use.

6 Mod. 142,  
 144, Smith v.  
 Harmon.—  
 Hob. 97.

§ 13. Where a statute used the words *arrest of judgment*, the court laid down this rule, to wit, "when an act of parliament makes use of such a term generally, it shall receive the same sense that the common law takes it in, and no other"—meaning a term known in that law. But this rule must not be extended to ancient words in that law, which, in a long process of time, have changed or varied their meaning, as many feudal words and words in religion &c. have.

Plow. 365,  
 Zouch v.

§ 14. But it is ever a good rule to know what the common

Howell.—2 Inst. 301, 308.—1 Saund. 240.

law was before the making of a statute ; whereby it may be known if it introduced a new law, or only affirmed the common law ; or, if it varied that law, in what degree, or in what manner, and to what purpose. It is said, "the better construction of a statute is to expound it as near the rule of the common law as may be," and in the course which that law observes ; and the common law is to be cautiously altered.

§ 15. Therefore if a *new* remedy be given by a statute in a *particular* case, this is not to be extended to alter the common law in any other case ; so if a statute be obscure, it ought to be construed by the rules of the common law, which are the rules of reason, reviewed and improved in a succession of ages ; that is, if it be doubtful what a statute means, it ought to have a reasonable construction to effect the end proposed, as far as it can be discerned.

§ 16. 6th. *All the statutes on one subject to be viewed as one ;* for all the statutes on the same subject express the sense of the legislature on that subject ; as if a prior statute forbid a thing, and an after one inflict a forfeiture on the person doing it ; both must be viewed as one statute, as both constitute the crime and the punishment ; and if a third regulate the mode of proceeding in the case, still all three are to be considered as one act. And this doctrine is said in one case to extend to those repealed ; as on a question, if five overseers of the poor could be appointed, Lord Mansfield said, "it is a rule in the construction of statutes, that all which have relation to the same subject, notwithstanding some of them may be expired, or are not referred to, must be taken to be one system, and construed consistently ;" and the practice has been so to do in cases of bankruptcy, church leases, and other cases. See how one statute that revives another, is construed, and where on a future contingency.

§ 17. 7th. *Statutes remedial, and concerning the public good.* The general rule seems to be, that such statutes must be construed liberally ; that is, equitably, or in an enlarged manner ; as if a statute be to support religion, learning, or the poor, it shall be construed to bind the king, though not named, and be so construed as to attain the end proposed, if possible.

§ 18. But it is held, that a statute which gives away the property of some subject, is not for the public good, and so is to be strictly construed ; as the statute for the relief of poor prisoners. Held by Treby C. J., "the act being for giving away the right of the subject, it ought to be construed strictly ;" and per Holt, "let an act of parliament be ever so charitable, yet if it gives away the property of the subject, it ought not to be countenanced."

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1 Saund. 240.  
—10 Mod.  
245.—2 Inst.  
148.

11 Co. 59,  
Foster's case.  
—Win. 86,  
Hickford v.  
Mackin.

Plow. 206,  
Stradling v.  
Morgan.

Rex v. Lox-  
dale & al. 4  
Bac. 646.

7 Cranch,  
382.

11 Co. 71, case  
of Magdalen  
College.—  
Stra. 517,  
Rex v. Ar-  
magh.—5 Co.  
14.

12 Mod. 13,  
Callady v.  
Pilkington.

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Flow. 73,  
Wimbish v.  
Talbois.—3  
Co. 7, Hey-  
don's case—  
1 Co. 120.—  
11 Co. 70, 73.  
—Cro. Car.  
533.

§ 19. A remedial statute ought to be so construed as to suppress the fraud or mischief, and so as to attain its end, because such construction is for the furtherance of justice. The judges ought, say many writers, so to construe a statute as to advance the remedy thereby provided, to guard against subtle evasions and delays for private advantage, and so as to give life and strength to the remedy, according to the true intent of the makers of the law, *pro bono publico*, that is, the law must be construed according to the true meaning of the makers of it. The only sound rule, after all, where this meaning can be found; this brings us to the last rule of construction. As

§ 20. 8th. *The intent of the legislators.* Where this is found or understood, there can be no question, as above stated. It must be the rule and guide; for where perceived by the judges, a deviation from it must be intentional, and so wholly unjustifiable; as the judges may as well make a new statute of their own, and decide the case by it, as designedly depart from the understood meaning and intention of the legislature. Where this meaning is satisfactorily perceived and understood, there is no room for a liberal, or strict, or equitable, or large, or narrow, or other construction, than according to this meaning.

The cases to this purpose are numerous, invariably supported by sound principles, and maxims of law. Several of these cases have been cited already. Also,

Flow. 332,  
Williams v.  
Barnly.—  
Flow. 203.—  
1 Mod. 160.—  
2 Inst. 136,  
181.

§ 21. In this case held, such a construction ought to be put on a statute, as may best answer the intention which the makers of it had in view; the only difficulty is in finding this intention. To do it, also numerous rules are stated by law writers; such as to inquire, what the prior law was; what the defects found in it; what the real evil to be remedied; to view and examine the whole statute; and frequently to take into view foreign circumstances; and especially the views able judges and lawyers have taken of it; keeping in sight the maxim, that *contemporanea expositio est fortissima in lege*. It is the intention that ought to govern, not the letter of a statute; therefore, what is within the letter, and not within the intention, is no part of it; and whatever is within the intention, is a part of the statute, though not within the letter. As where

Flow. 206,  
Stradling v.  
Morgan.

§ 22. The statute of Gloucester, c. 1, provided, "that the disseizee shall recover damages in a writ of entry, founded upon a disseizin against him, who becomes tenant after the disseizor;" yet if the disseizor by deed enfeofed three persons, and make livery of seizin to two of them, but the third was not present at the livery, nor ever agreed to the feoffment, nor received any of the profits, he shall not be liable to answer in damages to the disseizee, though he become, by the death of

the other two, tenant after the disseizor ; and so was within the very words of the statute ; for the legislature could never intend to make him who never assented to the wrong done to the disseizee, answerable for it. CH. 196.  
Art. 5.

§ 23. The misrecital of the title of a public statute, not fatal, though the party confine himself by the words *contra formam statuti* ; and in debt on a penal statute, the plt. must particularize each offence ; as each offence is distinct and separate. 1 Ld. Raym.  
77. Chance  
v. Adams.

§ 24. Though a public statute be misrecited in part, yet if enough be well recited to support the action, it is well ; as where the plt. declared on 2 R. II. c. 5, and misrecited part, but recited well enough for his action, and had judgment ; and this case put, the plt. sued for a robbery on a statute, and recited *incendia domorum* ; but the statute was *incendia*, generally, without *domorum*. Held, well ; for the plt's. suit was only for a robbery, for which the statute was well recited, and not about burning, which was mistaken. 2 Mod. 98,  
99, Shaftsbury  
v. Digby.

Lord Coke, in his index to his Reports, has divided statutes into about thirty classes, as they may be extended by equity and construction to other matters, persons, and times, modes, and forms, actions and pleas, &c. than those mentioned in the particular statute ; as to confirming and repealing the common law, different tenures, offences, &c. ; and has in this index referred to scores of statutes, and constructions of them, in explanation and support of each class and each position. For instance, " where, and in what statutes the generality of words shall be restrained by equity, and construction made against the letter of the statute ;" and he refers to upwards of one hundred cases, to explain and support this class of cases. But when we attentively follow these references and examine the authorities referred to, we find a great part of them have no bearing on the point ; and many others so minute and refined as to be of but little or no use. With all this immense prolixity, it may be observed, that but very few of the statutes now in existence in England, and in use, were so in his time. The last statute he cited was 3 Jam. I. Many of those he did cite are now obsolete, even in England, and seven eighths of them never had any relation to this country ; so that but little good law, in this relation, is to be collected from his almost innumerable cases involving statute law. 1 to 13 Co.

§ 25. In the construction of a statute, long and continued usage in practice upon it, is good evidence of its meaning, and is to be relied on. This was said in relation to a statute of Pennsylvania of 1715 ; and if a deed contained lands in several counties, and was recorded in one only, the exemplification of it was good as to all the lands. 6 Cranch, 22,  
Mc Keen v.  
Delancy.

§ 26. Another rule is, " that an act which is to take away 6 Bac. Abr.  
368.

CH. 196. or clog a remedy, which a party has by the common law,  
 Art. 6. ought never to have an equitable construction."

ART. 6. *Pleading statutes.*

§ 1. *The way to punish disobedience to a statute.* Statutes are framed in different ways; some merely forbid an act to be done, or command an act to be done, but provides no penalty, or mode of prosecution, leaving both to some prior laws. Some add the penalty, but not this mode, and some add both. If the penalty be not otherwise disposed of, it belongs to the aggrieved or injured party. If no penalty be named, and the act is against a public offence, the punishment is fine and imprisonment at common law; but if a private wrong, then an action upon the statute at common law, that is, an action grounded on the statute, but framed on the principles of the common law. See American Precedents, c. 8, page 63; and Penalties, Ch. 148.

4 Bac. Abr.  
 653.—2 Inst.  
 159.—Lev.  
 290.—10 Co.  
 75.

§ 2. Where a statute commands or prohibits a thing or act, for A's advantage, he has an action on the statute to recover a satisfaction for the injury done him contrary to it, or in disobedience of it. If no remedy be expressed, it is implied; and an action "is a consequent, and a thing implied in every thing prohibited by a statute."

Poph. 175,  
 Welden v.  
 Vesey.

§ 3. Wherever a penalty is given by a statute, but no suit, debt lies for this penalty.

2 And 127,  
 128, Agard v.  
 Taudish.—  
 Cro. El. 480,  
 Partridge v.  
 Naylor.

§ 4. And where the penalty, or a part of it, is given to him who will sue for it, any one may have an action or information for it; and if for a penalty against several defts., only one penalty is recovered; as for impounding a distress illegally. Plea, not guilty. Verdict, guilty. Damages assessed by the jury, 40s. Held, there could be but one 40s., and one penalty, £5, against all; for it is but one offence, and one distress in all.

Cro. El. 655,  
 Croucher's  
 case.

§ 5. Croucher was indicted for burglary. Held, "that in every case, where a statute prohibits a thing, and doth not limit a penalty, the party offending therein may be indicted, as for a contempt against the statute;" also if one sustain a special damage, he has his action. See Case.

2 Sid. 209,  
 Rex v. Paw-  
 lin.—1 Mod.  
 71, The King  
 v. Legnibam.  
 —And 288.

§ 6. But if the matter commanded or prohibited by the statute, be injurious only to one or two persons, an action lies: so, though it extend to all persons in words, but chiefly concerns private disputes, an action only lies, and no information or indictment; as for taking unreasonable distresses of several tenants; for it is a private matter, and the remedy a *qui tam* action.

2 Inst. 121.—  
 11 Mod. 207,  
 Hall v. Hala-  
 day.

§ 7. Whenever a statute gives a new action, the declaration must mention the statute; but enough to follow a prescribed form, as above; and when a statute directs what must be pleaded, the plea must be in the words of the statute.

*Contra formam statuti*, where material. Ch. 218, a. 14.

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As the judges *ex officio* take notice of public statutes, they may be pleaded without reciting them. 4 Co. 76.

Art. 6.

§ 8. Page 55, fourth point, resolved, that against a general statute, whereof the judges *ex officio* take notice, the other party cannot plead *nul tiel record*; for of such act the judges ought to take notice. But if it be misrecited, the party ought to demur; and this is reasonable; for if the record of such statute be lost, it ought not to prejudice the State; but if lost or consumed, the judges, by a printed copy or by the record in which it is pleaded, or by other means, may inform themselves of it.

8 Co. 28, 62,  
The Prince's  
case.

What is a public, what a private, statute; see Ch. 148, Debt for Statute Penalties.

§ 9. If a private statute be pleaded, it must be specially stated; for the judge otherwise cannot notice it; and when so stated, its contents may be put in issue, on *nul tiel record* pleaded. Not necessary to state the title or preamble in pleading a statute. See prior chapters; and *Birch v. Bellamy*, Am. Peced. 64.

4 Co. 76.—2  
Mod. 57,  
Parker v.  
Welby.—6  
Mod. 662.—8  
Mod. 144.

§ 10. If one statute prohibit the doing of an act, and another inflict a forfeiture on the person doing it, the plt. suing for the forfeiture, must state both statutes, as both are essential to his case.

Plow. 206,  
Stradling v.  
Morgan.

§ 11. This was an indictment for perjury in an affidavit to hold to bail, laid to be taken on 12 Geo. II., by 5 Geo. II. which altered it in some respects. Urged, it should have been laid as taken on the last statute, not merely because a continuing act, but as it made several alterations in the former. Held, when an act is continued, it is in full force; "and as it is not altered in this respect," it is but a common continuance *quoad hoc*.

Stra. 1066,  
Rex v. Mor-  
gan.

§ 12. If a party recite a statute as made on a certain day, he fails, though a public one; for in such case he does not refer to the knowledge of the judges, as he does in stating it "against the form of the statute, in such case provided." If he so plead, the law refers the thing pleaded to such statute, as is apt for his case; but as he recites a particular statute, if there be none such, his action is grounded on that which does not exist, and he fails in his plea. Cro. El. 307; 6 D. & E. 771.

Plow. 79, 84,  
Partridge v.  
Strange.—  
May recite in  
the past  
tense;  
Doug. 94.—1  
D. & E. 320.  
—1 Saund.  
262.—2 Vent.  
215.—Cro.  
Car. 136.

§ 13. Though a public statute need not be recited in pleading; yet if that or the title is misrecited, it is fatal; but how cured by concluding *contra formam statuti in hujus modi* &c.; see *Platt v. Hill*, Am. Peced. 65. But in this case also, held, if a private statute be misrecited in pleading, the court must take it to be as recited, unless it is denied to be so, by pleading *nul tiel record*; or shewn to be otherwise, by alleg-

6 Mod. 62.—  
Cro. El. 236.

2 Mod. 241.

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—Cro. Car 134.  
—Cro. El.  
186, 236.

Holt on Li-  
bels, 311.

Bul. N. P.  
224.

ing how it ought to have been recited. In either of which ways advantage may be taken of the misrecital; but if the deft. admit, in pleading, the misrecited private statute, it is well; and the court will intend there is such a statute: so a verdict may cure the misrecital. The misrecital of a statute that alters the sense of it, is fatal; but not a misrecital of an immaterial part.

Though a misrecital of a *private* statute is cured by verdict, yet that of a *public* one is not. Punishments without infamy, are fine and imprisonment, or either of them; with infamy, are pillory, whipping, loss of ears, branding, and burning of the subject matter by the common hangman, attached to fine and imprisonment.

§ 14. *Public statutes must be pleaded in some cases as well as private*; as where they make void *legal solemnities*; for where statutes do declare solemn contracts void, as usurious contracts &c., yet it is not the construction of law to make them mere nullities, but only *voidable* by the party prejudiced by them, and this by pleading such statutes; and one reason of the construction arises from this rule in construing statutes, viz. *quisque potest renunciare jure pro se introducto*. But this rule must be rejected, if such contracts be deemed perfect nullities, and the party must receive benefit from the statute whether he would or not. Hence such statutes *must* be pleaded, that the party may appear to take the benefit of them. "Another reason of this construction is, that, as what shall constitute the solemnities of a contract is matter of law, so it is matter of law how these solemnities ought to be defeated and destroyed; and, inasmuch as it is matter of law by what solemnities a contract is constituted, therefore, when any action is founded upon any solemn contract, that contract ought to be proffered to the court; now it were preposterous that the law should require the contract to be offered to the court, that it may appear to be legally made; and that it should not require it to be offered to the court, to *see* how it is defeated. Both certainly must be determined by the same judicature;" "therefore you cannot give the act of El., touching *usurious* contracts, in evidence on the general issue, though a general law, but it ought to be pleaded. So the statute of sheriffs' bonds cannot be given in evidence on the general issue, but ought to be pleaded. So a fine is made void by the statute of Westminster 2, c. 1; but construed only to be voidable; and a recovery by a wife, with a second husband, is made void by 11 H. VIII., but construed only voidable." This doctrine now holds, that such a statute must be pleaded, and not given in evidence in the cases of *deeds*, to be avoided; but the law has been changed since Buller wrote, as to simple contracts; now, as to them, the party may plead *non assumpsit*, and give usury &c. in evidence. See Usury.

§ 15. *So a subsequent statute must be pleaded*; as "if an action or information be brought upon a penal statute, and there be another statute that exempts or discharges the defts. from the penalty, this ought to be pleaded, and cannot be given in evidence on the general issue; for the general issue is but a denial of the plt's. declaration; and the plt. has proved the deft. guilty when he has proved him within the law upon which he has founded his declaration; so that the plt. has performed what he has undertaken. But if the deft. would exempt himself from the charge, he ought not to have denied the declaration, but have showed the law that discharges him;" for though there is a rule in construing statutes, that all on the same subject must be viewed together as one, yet there is another rule in pleading statutes and deeds; and that is, the party need state no more of any one than makes for him, leaving the part in favor of the other party to be pleaded by him, with one exception, often stated, and that is, when a party cites or pleads a clause, he must so cite or plead the whole of it, as to adopt the full sense of it, otherwise he does not properly plead or cite such clause; as a *proviso* or exception, making part of an enacting clause, it must be cited or pleaded as part, as otherwise the true sense of the clause is not stated. See Exception.

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Art. 6.

§ 16. But a saving *proviso* in a statute, need not be pleaded, but may be in evidence on the general issue; for if the party be within such a *proviso*, he is not guilty on the body of the act on which the action is founded.

Bul. N. P.  
225.—Jones,  
230.

§ 17. In an action for a penalty, under the 37th section of the act to regulate highways, the plt. need not negative the *proviso* in his declaration; 1 Johns. R. 50; 4 Johns. R. 304, &c.; for if the *proviso* furnish matter of excuse for the deft., the plt. need not negative it in his declaration; but the deft. must plead it; as in this case it formed no part of the plt's. title; the court referred to Serjeant Williams, in his Note to 1 Saund. 262; and his note should not confine the *proviso* to an after section. See a. 3, s. 1.

3 Johns. R.  
439, Bennett  
v. Hurd.

§ 18. But in a *qui tam* action, brought by a common informer, under the 2d section of the statute for preventing usury, (10 Sess. 13) the declaration must state, the party aggrieved neglected to sue within the year, in order to give the plt., a common informer, a right of action.

7 Johns. R.  
402, Morrill  
v. Fuller.

§ 19. Wherever a deft. wishes to avoid a contract, as contrary to a statute, he must, in his plea, state the facts that show his case is within the statute; saying generally, the case is within the statute, is not sufficient; was debt on a bond respecting the sale of an office, made void by 5 & 6 E. 6, c. 16; and in this case, the court said, it was not sufficient to plead generally it

Willes, 247,  
248, Huggins  
v. Bambridge.

- CH. 196. "was corruptly, and against the form of the statute, agreed,"  
 Art. 7. "but it must be particularly shown that this is such an agreement as the statute has declared void."


ART. 7. *British statutes adopted in the United States.*

In the practice of the law in these States, there is no question more difficult to be answered than this: What British statutes were there adopted in the British Colonies, now United States? Whatever were adopted, made a part of the laws of the Colony adopting them, and now are generally a part of the laws of the State that succeeded the Colony.

Very different was the practice in this respect, in different Colonies. In the *charter* Colonies, but very few were adopted, or practised upon; in the *proprietary* Colonies, not many; but in the *royal* Colonies, usually a great many. Fully to notice all the British statutes, adopted or practised upon in our several Colonies, would require a volume; but only a few pages can be spared for the purpose in this work. It will suffice to make a list of them, adopted in one royal Colony, perhaps the largest list in them all; then to notice some particulars in other Colonies.

§ 1. A. D. 1712, Carolina, then including Georgia, and now six States, as the two Carolinas, Tennessee, Georgia, Alabama, and Mississippi, passed an act declaring the following British statutes should have the same force in that Province as if passed by the legislature thereof; pages 21 to 100, South Carolina Laws, quarto, printed A. D. 1790. Statutes as to the following matters, viz.:

1. *Magna charta*, A. D. 1225, 9 H. III. c. 1, s. 29, 34.
2. Declaring how sureties should be charged to the king, 9 H. III. c. 8; that the king's debtor dying, the king should be first paid, 9 H. III. c. 18; that wager of law should not be without witness, 9 H. III. c. 28.
3. Declaring he is born a bastard, who is born before the marriage of his parents. A. D. 1235, 2 H. III. c. 9.
4. A distress not to be driven out of the county, and must be reasonable. 52 H. III. c. 4.
5. Providing a remedy against accountants, farmers to make no waste. 52 H. III. c. 23.
6. What kind of manslaughter should be adjudged murder. 52 H. III. 25.
7. No penalty for escape before it be adjudged. 3 E. I. c. 3.
8. What adjudged wreck of the sea, what not. 3 E. I. c. 4.
9. Amercements to be reasonable, and according to the offence. 3 E. I. c. 6.
10. The punishment of felony, refusing lawful trial. 3 E. I. c. 12.
11. Appeal against principal and accessory. 3 E. I. c. 14.

12. None to be distrained for debt he oweth not. 3 E. I. c. 23. CH. 196.  
 13. The penalty of a serjeant or pleader, committing deceit. Art 7.  
 3 E. I. c. 29. 
14. One person killing another in his own defence, or by misfortune, an appeal of murder. 6 E. I. c. 9.  
 15. Masters' remedies against their servants, and other accountants. 13 E. I. c. 11.  
 16. The ordinary chargeable to pay debts like executors. 13 E. I. c. 19.  
 17. A married woman eloping with her advouterer. 13 E. I. c. 34.  
 18. No distress to be taken but by bailiffs, known and sworn. 13 E. I. c. 37.  
 19. A woman's suit shall not be deferred by the minority of the heir. 13 E. I. c. 40.  
 20. Nothing shall be taken to maintain any matter in suit. 28 E. I. c. 11.  
 21. What shall be done with them who make false returns of writs. 28 E. I. 16.  
 22. Who deemed conspirators, and who champertors. 33 E. I. st. 2.  
 23. The punishment of such as commit *champerty*. 33 E. I. st. 3.  
 24. In what case felony to break prison. 1 E. II. st. 2.  
 25. Inquiry to be made of goalers, which, by duress, compel prisoners to appeal. 1 E. III. c. 7.  
 26. In what cases only pardon of felonies shall be granted. 2 E. III. c. 2.  
 27. Justices to have authority to punish breaches of the peace. 2 E. III. c. 6.  
 28. Authority of justices of assize, gaol delivery, and of the peace. 4 E. III. c. 2.  
 29. Executors shall have an action of trespass for a wrong done to their testator. 4 E. III. c. 7.  
 30. Sheriffs &c. shall have sufficient in their counties. 4 E. III. c. 9.  
 31. Sheriffs &c. shall receive offenders without taking any thing. 4 E. III. c. 10.  
 32. Justices of assize shall inquire of maintainers, conspirators, and champertors. 4 E. III. c. 11.  
 33. None shall be attached or forejudged against the great charter or the law. 5 E. III. c. 9.  
 34. The punishment of a juror that is ambidexter, and taketh money. 5 E. III. c. 10.  
 35. None shall maintain any quarrel but their own. 20 E. III. c. 4.  
 36. Justices of assize shall inquire of, and punish the misdemeanours of, offenders and officers. 20 E. III. c. 6.

- CH. 196. 37. Children born beyond sea inheritable in England. 42  
 Art. 7. E. III. c. 10.
38. What thing the admiral &c. shall meddle with. 13 Rich.  
 II. c. 5.
39. The punishment of an attorney found in default. 4 H.  
 IV. c. 18.
40. Judgment given shall remain till reversed by error &c.  
 4 H. IV. c. 23.
41. Amendments. 8 H. VI, c. 12, s. 15.
42. The penalty for carrying a woman away, who has  
 lands or goods, against her will. 3 H. VII. c. 2.
43. All deeds of gifts, made to defraud creditors, void.  
 3 H. VII. c. 4.
44. A mean to help and speed poor persons in their suits.  
 11 H. VII. c. 12.
45. Sale of lands by part of the executors, lawful. 21  
 H. VIII. c. 4.
46. An act concerning uses and wills. 27 H. VIII. c. 10.
47. For joint tenants, and tenants in common. 31 H.  
 VIII. c. 1. Partition.
48. Bill of bracer and buying of titles. 32 H. VIII. c. 9.
49. Joint tenants and tenants in common, for term of life  
 or years, shall make partition. 32 H. VIII. c. 32.
50. Wrongful disseizin is no descent in law &c. 32 H.  
 VIII. c. 33.
51. Against fraudulent deeds, alienations, &c. 13 El. c. 5.
52. Against covenous and fraudulent conveyances, to de-  
 fraud purchasers. 27 El. c. 4.
53. To avoid the double payment of debts, (shop-books  
 not evidence.) 7 Jam. I. c. 12.
54. For the relief of creditors against such persons as  
 die in execution. 21 Jam. I. c. 21. Lands liable &c.
55. To prevent frauds and perjuries. 29 Ch. II. c. 3.
56. To enable creditors to recover their debts of the ex-  
 ecutors, and administrators of executors, in their own wrong.  
 30 Ch. II. c. 7. 56 A. *Habeas corpus*. 31 Ch. II.
57. The sale of goods distrained for rent, in case the  
 rent be not paid in a reasonable time. 2 W. & M. c. 5.
58. For the relief of creditors against fraudulent devises.  
 3 & 4 W. & M. c. 14.
59. As to natural born subjects claiming through alien  
 ancestors &c. 11 & 12 W. III. c. 6.
60. As to promissory notes, and inland bills. 3 & 4 Anne,  
 c. 9.
61. As to the amendment of the law. 4 Anne, c. 16.
62. To enable infants seized or possessed of estates in  
 fee, in trust, or by way of mortgage, to make conveyances of  
 such estates. 7 Anne, c. 19.

63. For the better security of rents, and to prevent frauds committed by tenants. 8 Anne, c. 14. CH. 196.  
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*Also several other statutes respecting*

64. Appellants : 13 E. I. c. 12 :

65. Night walkers : 5 E. III. c. 14 :

66. Pardons : 10 E. III. stat. 1, c. 2 ; 14 E. III. stat. 1, c. 15 :

67. Indictors : 25 E. III. stat. 5, c. 3 :

68. Exigent, debt, detinue, and replevin : 25 E. III. stat. 5, c. 17 :

69. King's protection : 25 E. III. stat. 5, c. 19 :

70. None to lose his goods by his servants' faults : 27 E. III. stat. 2, c. 19 :

71. Administration : 31 E. III. c. 11 :

72. False verdicts : 34 E. III. c. 8 :

73. *Idemtitate nominis* : 36 E. III. st. 2, c. 2 :

74. Ships : 38 E. III. c. 8 :

75. False verdicts : 38 E. III. c. 12 :

77. False entry : 8 R. II. c. 4 :

78. Forcible entry : 15 R. II. c. 2 :

79. Admiralty jurisdiction : 15 R. II. c. 2 ; 2 H. IV. c. 11 :

80. Cutting out the tongue : 5 H. IV. c. 5 :

81. Judgments at *nisi prius* : 14 H. VI. c. 1 :

82. Appeals : 18 H. VI. c. 12 :

83. Women bound : 31 H. VI. c. 9 :

84. Executors against servants embezzling : 33 H. VI. c. 1 :

85. Main prize : 1 R. III. c. 3 :

86. Bail : 3 H. VII. c. 3 :

87. Writs of error : 3 H. VII. c. 10 :

88. Justices of the peace : 4 H. VII. c. 12 :

89. Clergy : 4 H. VII. c. 13 ; 4 & 5 P. & M. c. 4 ; 8 El. c. 4 :

90. No clergy in murder : 12 H. VII. c. 7 :

91. Stolen goods : 21 H. VIII. c. 11 :

92. Treason : 23 H. VIII. c. 1 :

93. Perjury : 23 H. VIII. c. 3 ; 5 El. c. 9 :

94. Nonsuits : 23 H. VIII. c. 15 :

95. Killing thieves : 24 H. VIII. c. 5 :

96. Standing mute : 25 H. VIII. c. 3 :

97. Buggery : 25 H. VIII. c. 6 :

98. Pirates : 27 H. VIII. c. 4 ; 28 H. VIII. c. 15 :

99. Marriages made valid, notwithstanding pre-contracts : 32 H. VIII. c. 38 :

100. False letters and tokens, to get goods : 33 H. VIII. c. 1 :

101. Burning frames : 37 H. VIII. c. 6 :

102. Bailment of persons : 1 & 2 P. & M. c. 13 :

103. Felons : 2 & 3 P. & M. c. 10 :

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- 104. Taking away maidens : 4 & 5 P. & M. c. 8 :
- 105. Forgery : 5 El. c. 14 :
- 106. Hue and cry : 27 El. c. 13 :
- 107. Extortion : 29 El. c. 4 :
- 108. Perjury : 43 El. c. 3 :
- 109. Fraudulent administration : 43 El. c. 8 :
- 110. Benefit of clergy : 1 Jam. I. c. 8 :
- 111. Marriage where a party is living : 1 Jam. I. c. 11 :
- 112. Nonsuits : 4 Jam. I. c. 3 :
- 113. Small felonies : 21 Jam. I. c. 6 :
- 114. Destroying bastard children : 21 Jam. I. c. 27 :
- 115. Vexatious arrests : 15 Ch. II. stat. 2, c. 2 :
- 116. Arrests of judgments and executions : 16 & 17 Ch. II. c. 8 :
- 117. Suits and delays : 17 Ch. II. c. 8 :
- 118. Maiming : 22 & 23 Ch. II. c. 1 :
- 119. Burning houses, corn, &c. : 22 & 23 Ch. II. c. 7 :
- 120. Settling intestate estates : 22 & 23 Ch. II. c. 30 :
- 121. Poor prisoners for debt : 22 & 23 Ch. II. c. 20 :
- 122. Benefit of clergy : 3 & 4 W. & M. c. 4 :
- 123. Clandestine marriages : 4 & 5 W. & M. c. 36 :
- 124. Profane swearing &c. : 6 & 7 W. III. c. 33 :
- 125. Treason : 7 W. III. c. 3 :
- 126. Posthumous children. 10 & 11 W. III. c. 16.

These British statutes, when adopted, extended to all that great portion of the United States, south of Virginia. These six large States, altogether, are as large as France. Lock's system, established in this extensive territory, was mainly political, so ought to be a part of a political work.

Dallas, 64,  
67, Morris,  
lessee, v.  
Vanderen.

The general rules stated in the Reports of Dallas, as to Pennsylvania, hold generally in the British Colonies, to wit: no act of Parliament, enacted previously to the settlement of Pennsylvania, was there in force, except by acts of the legislature of Pennsylvania; by adjudications of courts, or established usage. But the common law had always been in force in Pennsylvania; but acts of Parliament enacted *since* the Province was settled, have not been in force, unless Colonies were specially named. There has been a departure from this last rule in Massachusetts and some other Colonies, in a few cases. 28 E. V. c. 13, as to *per medietatem lingua*, was adopted in the Province of Pennsylvania, and a trial had thereon, and the State has declared all British statutes in force in the Province, remain so, till altered by the legislature.

1 Dallas, 73,  
75, Respub-  
lica v. Mesca  
& al.

§ 2. *British statutes adopted in Massachusetts in the time of the Colony and Province.* In regard to the adoption of English or British statutes in America, Massachusetts repre-

sents another very large portion of the United States,—in fact, all New England,—for the foundation of law, laid in Massachusetts as early as 1620, at Plymouth, and 1628 at Boston, Salem, &c., gradually extended throughout New England; first to Connecticut river, to Providence, Newport, &c., and also into New Hampshire, by emigrations from Massachusetts. In the laws early adopted in Massachusetts, were many of these British statutes.

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The numerous British statutes in the foregoing list, adopted in Carolina, may be considered in three points of view, in regard to Massachusetts, and New England generally: 1. Several of them never were law here, in any form, by adoption, enactment, or otherwise, such as the statutes as to appeals of murder &c.: 2. Many of them adopted here, and became part of our common law, such as the statutes of *magna charta*; as to powers of justices of the peace; as to executors suing for wrongs done to their testators; as to elopement, children born beyond sea; as to uses; as to defrauding creditors and purchasers; as to joint tenants &c.; frauds and perjuries; subjects claiming through aliens; as to promissory notes and bills &c.; the amendment of the law, &c. &c. 3. Several of these ancient British statutes have been re-enacted here, and made American statute law; some, after remaining a part of our common law a short time, and some a long time. For instance, the British statutes of limitations in real actions, remained a part of our common law till July 4, 1786; but some others remained so only till 1641, some till 1692, &c. &c.

As to the first description, in detail, British statutes never adopted in Massachusetts at all, in any form or for any time, the better opinion is, that of this description are the following, numbered as in the foregoing list:—2, 6, 10, 11, 12, 13, 14, 15, 16, 18, 21, 25, 26, 30, 42, 44, 53, 57, 62, 63, 64, 65, 66, 67, 68, 69, 70, 72, 73, 74, 75, 80, 81, 82, 83, 84, 91, 99, 101, 104, 105, 106, 119, 122, 123, 124, 125.

As to the second description, in detail, British statutes, adopted in Massachusetts, at some period, and for some time, though often for a short time only; the better opinion is, that the residue of the said list are of this description, to wit:—1, 3, 4, 5, 7, 8, 9, 17, 19, 20, 22, 23, 24, 27, 28, 29, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 43, 45, 46, 47, 48, 49, 50, 51, 52, 54, 55, 56, 58, 59, 60, 61, 71, 77, 78, 79, 85, 86, 87, 88, 89, 90, 92, 93, 94, 95, 97, 98, 100, 102, 103, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 120, 121, 126. These British statutes, once in force in Massachusetts, may be divided into six classes: 1. A considerable number of them, which were temporarily in use

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here, and for no long period,—in fact, only till statutes to supply their places were early passed by the legislature of Massachusetts; such as the statutes relating to nonsuits, for instance, passed 1641: so to distresses, passed the same year: so to forgery, passed 1646, and many other such cases, in which a question arises, what law had our ancestors, in the mean time, on these subjects. For instance, they must have had some law against forgery, from 1628 to 1646. What was this law? Not a Colony statute, for none appears to have existed in that time; but it was English common law, as that law was, before the enactment of the 5 El. c. 14, and perhaps that statute as to the first offence, as it was not materially different in its principles from the Colony law of 1646; however, the better opinion is, that this statute, 5 El. was not adopted here.

So as to perjury,—no Massachusetts statute appears on this subject till 1692, except one in 1646, limited to “false witness, wittingly, and of purpose to take away a man’s life.” Then as to perjury, in all cases but this one, there was no Colony statute, and for above sixty years. What then was the law against perjury in Massachusetts in that period; no doubt the English common law, and probably the 5 El. c. 9, also; because that statute was clearly an amendment, and an amelioration of that law on the subject; as, by that, the court could fine, imprison, and condemn to the pillory, at discretion; whereas, this statute defined and limited those common law punishments, and brought the case fully within the general and well established principle; viz. Wherever our ancestors adopted the common law here, they also adopted with it the British statutes, which amended and ameliorated it all, as parts of their common law here also. This statute was found to suit the Colonial state, and so was expressly adopted in several Colonies; and in 1692, the substance of it was expressly enacted by the legislature of Massachusetts, but in much fewer words; and thereby this English statute itself was no longer of use here. In this way it will be found, on an extensive examination, that many English and British statutes have been here adopted and practised upon for a time, and then revised, and expressedly, in substance, enacted into American statutes, by American legislatures. In fact, as we find but very few statutes passed in Massachusetts before 1641, and not many even before 1660, our ancestors must have, for years after they arrived here, made an extensive use of British statutes, wherever they applied to their new situation.

*Second description:* British statutes adopted, and still remaining a part of our common law; as generally *magna*

*charta*, and all the English statutes enacted to confirm and enlarge its privileges; various English statutes against chameperty, maintenance, extortion, conspiracy, corrupt verdicts, &c.; against frauds, and perjuries, covinous and fraudulent conveyances, to cheat creditors and fair purchasers. Statutes of Edward III. &c. giving powers to justices of the peace &c. English statute in relation to the elopements of wives; executors, &c. suing for torts to their testators; to children born beyond sea; and to subjects or citizens claiming estates through, by, or from, aliens; to the distinctions between admiralty and common law jurisdictions; to uses and trusts; to joint-tenants and tenants in common, in many respects; to amendments, as double pleading, demurrers, payments after the day; to promissory notes and bills of exchange; to false tokens and letters to get goods; deceits in legal practice; to benefit of clergy, commuted, as above; to killing in self-defence &c.; and numerous other British statutes, stated and remarked upon in various parts of this work, as being a portion of our common law.

General principle adopted, has been,—when we have adopted a British statute, we have adopted the British constructions of it. 2 Day's Ca. 225.

§ 3. *Third description*: British statutes adopted here, and at a late period revised, and in substance expressly enacted into statute law in Massachusetts; such as the English statutes of limitations in real actions, before mentioned. Several parts of *magna charta*, bill of rights, and petition of rights, in 1780, here enacted and engrafted into our State constitution, and bill of rights annexed to it; and some in 1789 and 1790, into the Federal constitution and amendments. The English statute as to standing mute &c. was practised upon here till 1796, and then revised, and expressly enacted into a Massachusetts statute. So the British statutes as to treason, were practised upon here entirely, till 1678, then revised, and in a small degree enacted into Massachusetts statute law; in a more considerable degree in 1696, but never done away as such, and wholly enacted into such Massachusetts law, till the year 1777. So the situation of the English *habeas corpus* act has been somewhat similar. Very similar was the situation and progress of the English statutes as to bail. So we had no Massachusetts statutes as to apprentices generally until 1794, and then enacted one out of British common and statute law long practised upon here with some additions. So it was a common case for our ancestors to convert British statutes adopted here, into Massachusetts statute law, by piecemeal, on the same subject; for instance, as to replevins, a Colony statute of 1641, enacted the substance of the 52 H. III., and a part of 13 Ed.

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I. c. 2, relating to replevins. Our statutes of 1698 and 1720 made further provisions; but it was not till 1789 that English statutes, as to returns, withernam, second deliverance, &c. adopted here, were turned into Massachusetts statute law.

And in general, the Colony legislature, in a multitude of cases, converted British statutes, and parts of British statutes, previously adopted in the Colony, into Colony statutes. The same course took place in the Province, and has in the Commonwealth; for in the revision of our laws, since our State constitution was adopted, many clauses in British statutes, long in use here, have been enacted into Massachusetts statute law. This will clearly appear on comparing the Commonwealth's statutes with those of the Province, and then tracing their differences to their true sources.

Several British statutes, noticed in this work, it will be observed, were adopted and practised upon in the Colony and Province of Massachusetts, not contained in the foregoing list of statutes adopted in Carolina.

2 Dall. 307,  
320, 410.—3  
Dall. 171 to  
184, Marbury  
v. Madison.

§ 4. Statutes in the United States contrary to the constitution, are void, and the courts are bound to declare them so. 1 Bin. 416; 4 Dall. 14, 20, Cooper v. Telfair; 1 Cranch, 137 to 179; and a statute of any State contrary to a treaty of the United States, is inoperative. 1 Johns. R. 277, 281, Jackson v. Munson; 4 Cranch, 417, Higginson v. Mein; 4 Johns. R. 75, Jackson v. Wright; 3 Dallas, 199 to 285, Ware, administrator of Jones in error, v. Hylton & al. The treaty &c. revived the British creditor's right of action. Hylton in error v. United States.

3 Dallas, 386  
to 401, Cald-  
er & ux. v.  
Bull & ux.

§ 5. What an *ex post facto* law within the Federal constitution: 1. Only in criminal cases: 2. That makes an action criminal that was innocent when done: 3. Or aggravates a crime after committed: 4. Or changes the punishment, and increases it after the act done: 5. Or alters the legal rules of evidence, and receives less or different evidence, than the law required when the offence was committed, in order to convict: 6. No statute mollifies the rigour of criminal law, is *ex post facto*, but only such as create or aggravate the crime, or increase the punishment, or change the rules of evidence for the purposes of conviction. Same rules apply to like provisions in the State constitutions. Our legislatures cannot declare what the law is, but only what it *shall be*. The words of a statute ought not to have a retrospective operation, unless they are so clear, strong, and imperative, that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied. Per Paterson, Justice.

1 Bay. 183.—  
2 Cran. 272.—  
3 Cain. 68.—  
3 Cranch,  
413, U. States  
v. Heth.

ART. 8. *Statutes in New York and some other States construed &c.* CH. 196.  
Art. 8.

§ 1. As the laws of the several States in the Union originated from the same source, the British system, with but few exceptions; and the objects and principles of legislation, in the several States, ever have been nearly the same, carried on under charters and constitutions, nearly the same in principle, all derived from the free parts of the British system; modified to suit the circumstances of a young, a rising, and a free people, there will, of course, be found as great a sameness in principle in the statutes in the different States, nearly, as in their constitutions. It is only necessary attentively to read these, to see they all came from the same fountain head, and were formed by men of similar principles and views; yet in the detail, and *minutiæ* of legislation, there will be found numerous differences. There are, and ever have been, throughout the whole, with a few local exceptions, nearly the same kind of judges, magistrates, officers, jurors, and rules of evidence; so that except in the *minutiæ* of forms in pleadings and practice, a good lawyer in one State, can practice, with ease, in any of the States, in most cases.

§ 2. Several statutes of the United States, of New York, of Pennsylvania, &c. have already been brought into view, more especially in the several branches of pleadings in this work. Some few may be here noticed, and some more will be in future chapters. Those now to be noticed, will be principally so, on account of the rules and principles of construction of statutes.

§ 3. A statute is not to be construed to operate retrospectively; so as to take away a vested right, or so as to impair it. But it is a principal of legislation, that laws, civil and criminal, must be prospective, and are not to have a retrospective operation: so in the laws of Rome, France, England, &c. Bracton, lib. 4, fol. 228; 2 Mod. 310; 4 Burr. 2460; Dig. 50, 17, 75; Code, 1, 14, 7.

7 Johns. R.  
513, Dash v.  
Van Kleeck,  
477.—8 Co.  
118, n.—1  
Bay. 93.

§ 4. Wherever a statute gives a remedy in the affirmative, or is an affirmative act, and without any negative, expressed or implied, for a matter that was actionable at common law, the party may still sue at common law, as well as on the statute; for the remedy at common law remains, and that on the statute is cumulative.

5 Johns. R.  
176, Almy v.  
Harris.

§ 5. Conveyances made by statute, pass no other or different right than that which the party before had; for the statute can only give him a power to convey his estate, or property he has in the thing.

8 Johns. R.  
385, Jackson  
v. Corey.

§ 6. The statute relating to distresses, does not apply to the case of a levy on personal property, made by an officer, on a warrant in the nature of an execution.

5 Johns. R.  
125, Rogers  
v. Brewster.

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Art. 8.

2 Johns. Cas.  
346, Palmer  
q. t. v. Doney.

§ 7. A statute for regulating inns and taverns gave a *qui tam* action for the penalty, for retailing strong liquors without a license; and in an action for this penalty, it was held the license was illegal and void; because it was given by two of the commissioners of excise, without the presence or consent of the supervisor, and when they were not assembled for the purpose of granting licenses; also, that though such a license is regular on the face of it, the same is no justification to the innkeeper, who is liable for the penalty. But if a tavern-keeper have a regular license, but it expires before the time of the next meeting of the commissioners of excise for granting licenses, he is not liable to the penalty, for retailing liquors after his license has expired, and before such meeting; yet he sells without license. But the decisions may be viewed as made on an equitable and reasonable construction of the statute, though not according to the words of it.

3 Johns. R.  
474, Bouton  
v. Neilson.—  
10 Johns. R.  
470.

§ 8. Proceedings under the statute regulating highways, must be in a summary way. The overseer is the judge of the party's delinquency; and the justice of the peace, in issuing his warrant, acts ministerially, and is not bound to give the party notice of the complaint or to summon him to appear or shew cause against the charge. Overseers not liable to a private action for adjudging one in default for not working &c.

4 Johns. R.  
75, 80, 269,  
Jackson v.  
Wright.

§ 9. Held, that a State statute contrary to the treaty between Great Britain and the United States, of 1794, was inoperative and void; and could not affect the right of the legal heirs, &c.

1 Johns. R.  
205, 211,  
Griswold v.  
N York Ins.  
Com.

§ 10. The court construed the statute of the State, for the inspection of flour, intended for exportation, not to require that flour once inspected and shipped, and afterwards damaged by sea-water, should be again inspected before exported. Though the act required all flour exported, to be inspected; this also was a fair construction of the statute according to the intention of the legislators, and the reason of the case; and not merely according to the words of the act.

1 Johns. R.  
165, Peck v.  
Randall's  
trustees.

§ 11. Under the statute for giving relief against absent and absconding debtors, the creditors cannot sue at law for his debt, the trustees appointed under the act, before his demand has been proved or adjusted and the dividend declared. His remedy is by petition to the equity powers of the court, under which the proceedings are instituted; and the court will compel the trustees to do their duty, or advise them in case of difficulty. The trustees under this act may plead the act of limitations in the same manner as the debtor himself could have done. This construction seems to have been according to the spirit of this insolvent system; that is, to prevent lawsuits, and to make a distribution under the equitable powers of the court.

Other such  
cases N. Y.,  
Johns. Ca.  
137, 372.

§ 12. In an action of debt for the penalty given by the *act to lay a duty* &c. and regulating inns and taverns (24 Sess. c. 164), if the deft. plead in bar a former conviction for the same offence, to support his plea, he must give in evidence a conviction drawn up in the form prescribed by the statute for the recovery of debts to the value of \$25 (31 Sess. c. 304); also, held, that the person who first sues, and he who first gets judgment in a *qui tam* action, is entitled to the penalty, though after a judgment in an action last commenced.

CH. 196.  
Art. 8.

6 Johns. R.  
101, 103,  
Beadlestone  
v. Sprague.

§ 13. A person in custody on a *ca. sa.*, was discharged under the statute for the relief of debtors, *with respect to the imprisonment of his body*. Held, the plt. might have a *fieri facias* against his goods &c. at any time afterwards, though above a year had elapsed without a previous *scire facias* to revive the judgment. This construction comes within the principles stated in the English cases above in *scire facias*. It appeared by the record the debt was not paid.

6 Johns. R.  
106, 108.

§ 14. In 1774, a person purchased lands at a sheriff's sales, and a deed was delivered to a third person, to be delivered to the purchaser, on his paying the purchase money; but he did not pay it; but in 1779, was attainted. Held, the State could not pay the money, and perform the condition, so as to divest the estate out of the original debtor or his heirs; and that a private act of the legislature, passed on the judgment creditor's petition, directing the land to be sold, and the money to be paid to him, did not take away the debtor's right or interest, or his heir's, or affect any person not a party to the act. These constructions were made in reference to the principles of the common law; and many English common law authorities were cited.

8 Johns. R.  
520, 557,  
Catlin v.  
Jackson in  
error, cited 2  
Phil. Evid.  
118; and 13  
Johns. R.  
403.

§ 15. The sheriff had a person in custody on an attachment for non-payment of costs, and discharged him, by an order of the Common Pleas, pursuant to the statute for the relief of debtors, as to the imprisonment of their persons. Held, this court's order was void, as he was not in custody on a conviction for a *contempt*, but only to be brought up to answer interrogatories; and the sheriff was held liable, as the court had no power to give such an order in this case, on a fair construction of the statute.

5 Johns. R.  
115, 117,  
Jackson v.  
Smith.

§ 16. Held, a person having a right to a ferry, under the statute regulating ferries, could not maintain an action on the case, for disturbing his right; his only remedy was the penalty given by the statute; he had no right at common law. An act of Assembly or statute in Pennsylvania was not deemed to be repealed by the king in council, until notification thereof was given in Pennsylvania.

5 Johns. R.  
175. Almy v.  
Harris.

1 Dallas, 9.

CH. 196. § 17. It has been inferred from the tenor of the statute of  
*Art. 8.* this Assembly for the revival of the laws, that the legislature  
 was of opinion that the separation of the Colonies from Great  
 Britain worked a dissolution of all government; this was not  
 the general opinion, nor the better opinion, and therefore such  
 acts of revival were not generally passed.

1 Dallas, 52,  
 61, Jacobs v.  
 Adams, exr.

4 Dallas, 14,  
 Cooper v.  
 Tellair.

4 Dallas, 132,  
 and 255, 265.

4 Dallas, 168,  
 169.

§ 18. Held, the confiscation acts of Georgia, were not repugnant to the constitution of that State; the same was generally true of the State statutes of confiscation in the revolution.

§ 19. Held, that the English statute of frauds and perjuries did not extend to Pennsylvania; and that her statute against the Connecticut intruders, was constitutional.

§ 20. Also, held, that the English statute respecting collateral warranties (4 Anne, 16, s. 21) did not extend to Pennsylvania.

How the statute of another State must be pleaded. See Walker & al. v. Maxwell, Ch. 42, a. 3; Ch. 81, a. 2; Ch. 184, a. 6.

4 Johns. R.  
 304, Teel v.  
 Fonda.

§ 21. Held, if a clause or section of a statute, giving an action for an offence, contain a *proviso* or *exception*, which is against the plt., it is matter of defence or justification for the deft.; the plt. need not negative the *proviso* in his declaration. But this decision must be understood to be subject to the rule laid down, article 3, especially, Rex v. Pratten.

1 Dallas, 67.

Held, 32 H. VIII. and 21 Jam. I., as to limitations of real actions, extended to Pennsylvania. See Limitations. *Quare*, as to 21 Jam. I.

6 Cranch, 87,  
 148, Fletcher  
 v. Peck —  
 Virginia  
 cases, 20 to  
 108. Retro-  
 spective act  
 as to confis-  
 cations in  
 New York.  
 Coleman, 84.

§ 22. A statute will not be construed *unconstitutional* by a law court, unless clearly opposed to the constitution: 2. The court cannot inquire into the *motives* which actuated the members of a legislature in passing a statute, if it can constitutionally pass such an act; and it is in due form passed: 3. Where a law is in its nature a *contract*, when absolute rights have vested under that contract, a repeal of the law cannot divest those rights: 4. A statute annulling conveyances, is unconstitutional, as it is a law impairing the obligation of contracts within the meaning of the Federal constitution; and a party to a contract, though a *sovereign State*, cannot declare its own deed invalid. A grant is a contract executed; a contract cannot be enforced in a court of justice, if contrary to a statute of a State, or of Congress. Dallas, 269, 342.

Chipman, 14,  
 Paine v. Ely  
 & al.

§ 23. A statute in derogation of the common law is to be strictly construed, and the provisions of such act must be strictly pursued, or the proceedings will be void, as the statute for the relief of poor debtors. Hence one set of justices cannot convene the creditors before another; is not in strict legal sense a remedial act.

§ 24. A statute provision for compelling tenants in dower to repair, extends only to dower assigned in the manner the statute prescribes. Kirby, 19, *Beers v. Strong*. Cn. 196.  
Art. 8.

§ 24. *Statute assigning debtors in service*,—is in abridgement of personal liberty; hence, to be construed strictly, and not to be extended by implication; by it the right of service is *personal*, and belongs only to the master named and approved by the court, which considers his character, as well as that of the debtor assigned; hence the assignment cannot be to a man, and his heirs, and assigns. Kirby, 33;  
and see Ch.  
53, a 33, s. 4,  
like principle.

§ 25. The 4th section of the act of Congress of March 2, 1799, providing, "that whenever a collector shall *die* or *resign*, the commissions to which he would have been entitled on the receipt of all duties bonded by him, shall be equally divided between the collector resigning, or the legal representatives of the deceased collector, and his successor in office," does not extend to collectors who have been removed. 2 Day's Ca.  
43, Whittelsey v. Wolcott.

§ 26. The act of October, 1782, for the equitable decisions of tenders, does not extend to cases adjudged, but only to cases open and prosecuting at law, and is confined to actions pending by original writ, appeal, or writ of error; nor can it be construed to look back to overturn a judgment rendered, and acquiesced in, at law. Kirby, 41,  
Kimbald v.  
Cady.

§ 27. The statute against working unsealed leather, refers to boots and shoes only, and extends not beyond the letter, so as to include saddles and harness. Kirby, 98,  
Church v.  
Thompson.

§ 28. On the act "for the punishment of certain gross crimes and offences," one injured by a forged note may have his action, though no party to such note. 1 Day's Ca.  
100, Ross v.  
Bruce.

§ 29. An assault committed by two persons jointly, and not in the presence or view of others, is a secret assault, within the meaning of the statute against secret assaults. Kirby, 108,  
Northrop v.  
Brush.

§ 30. The statute that allows interested persons to testify in the action of book debt, is not peremptory; but there are many exceptions. Kirby, 150.

§ 31. The act to prevent frauds in the sales of lands, does not extend to the government of the State. Id. 221.

§ 32. *Debtor* in the United States bankrupt act, means any person against whom the bankrupt's assignees have a demand. 2 Day's Ca.  
70.

§ 33. Under the statute authority, the arrest of ships, and the owner's residence put in issue, and found against him, not error; the declaration did not state him a non-resident: 2. Under this act, the plt. can recover beyond the amount of his bills annexed to his declaration, if within the *ad damnum*; and he may also recover costs: 3. Judgment, she remain liable &c., and if to be sold, or not, is for the court to decide, on a fair construction of the act: 4. One claiming to be owner, may 3 Caines' R.  
38, ship  
Nancy v.  
Fitzpatrick.

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3 Day's Ca.  
296, United  
States v. The  
Brig James  
Wells and  
cargo.

come in and plead in an attachment against his ship, without entering his appearance, or filing bail, and a verdict on his plea and judgment, is good.

§ 34. Nothing is to be implied against the claimants of property in case of the embargo act; as where the homeward bound cargo of a vessel that had proceeded to a foreign port, in contravention of the enforcing act of January 9, 1808, was seized; and held, not liable to condemnation, not being within words of the act or its meaning, but by implication: 2. But it seems, if such vessel be libelled for so proceeding; necessity arising from stress of weather, and from her condition, is no defence.

4 Day's Ca.  
121, United  
States v.  
Smith.—3  
Johns. R.  
41.—4 Do.  
304.  
9 Johns. R.  
356, 357,  
Stratton v.  
Herrick.

§ 35. The act of Congress of May 10, 1810, makes the offence complete, where persons are transported from one foreign country to another, to be sold *as slaves*; whether sold, or not, on her arrival, the penalty is incurred. 8 Johns. R. 41, 44; how construed, pleaded, &c.

§ 36. *Exemptions from toll on turnpike acts*; how construed: by one, persons were exempted going to and from a blacksmith's shop. Held, to be exempted, the person must go to the shop for the express purpose of having work done in it; going there with articles to pay for work done at a former time, by the blacksmith, did not entitle to the exemption: also held, in such case, that a person who had carried a load of goods to market, and on his return stopped at his blacksmith's to get work done, was not entitled to pass toll free on his return home. The going to the blacksmith's must be the principal, not the incidental business, to bring the case within the exemption.

ART. 9. *Statute where a contract.* See *Fletcher v. Peck*, a. 8, s. 22.

7 Cranch,  
164, 167,  
State of New  
Jersey v.  
Wilson.

§ 1. It is a general principle, well settled, that wherever a statute grants and vests in any one, an interest in property, it operates as a grant and contract, and cannot be repealed so as to affect such interest.

§ 2. Writ of error to the highest law court in New Jersey, in the following case. In the year 1758, a tribe of Indians in New Jersey, released all their right and interest in a very large tract of land, to that Colony; in consideration thereof, the Colony legislature granted to them a particular tract in fee, restraining them from making leases or sales, and added, that the lands so granted to them, "shall not hereafter be subject to any tax, any law, usage, or custom, to the contrary thereof, in anywise, non-withstanding." (Grant was in trust for them.) Indians remained in possession till 1801, then sold by consent of the legislature; no mention made of said exemption from taxes. In 1803, the trustees sold said lands

to Wilson & al. In October, 1804, the legislature passed an act, repealing said section in the act of 1758, as to taxes. Courts in New Jersey held the repeal valid; but the Supreme Court of the United States, held this repealing statute void, as the act of 1758, constituted a contract, which could not be rescinded by a subsequent legislative act. Repealing act is void under that clause of the constitution of the United States, which prohibits a State from passing any law impairing the obligation of contracts. The legislature might have consented to the sale, on condition the exemption should be relinquished, but did not.

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§ 3. *A contract forbidden by statute, is wholly void even after it is repealed.* As in assumpsit on a note given to the said bank by the defts., dated December 14, 1815, for \$300, payable in *facilities*, that is, notes of some banks in Connecticut, to be paid in two years after the close of the then war. Massachusetts legislature had passed an act, forbidding banks incorporated by it, to receive or negotiate bills or notes of banks not incorporated by it. The plts. took said note while this act was in force, and held, they could not recover on it, after the act was repealed; as it was totally void by the act. Act excepted the United States bank, and inflicted a severe penalty, as to words written on the note below the signing, as a part of it. And see *Jones v. Fales*.

14 Mass. R. 322, 326, Springfield Bank v. Merri-  
ck & al.—Stat. 1809, c. 38, s. 2.

§ 4. A new law, instituting a new punishment, does not take away the old one, except, or unless, it changes the nature of the offence laid by the court. In the *King v. Woolston*; *Bernard K. B.* 162, cited *Holt on Libels*, 79.

Holt on Libels, p. 79.

*Notes.*—Various forms of declarations, pleas, &c. referred to, on statutes, 10 Wentw. index, 108 to 111; 7 Wentw. 120 to 374, forms of pleas &c.; see Ch. 148, actions on penal statutes; statutes of frauds pleaded, 3 Wentw. 102; of gaming, 103; of usury, 105, 107; of 23 H. VI. to action on bail bond, that it was given for use and favour, 5 Wentw. 479; *American Precedents*, 264 to 271; and *Story's Pleadings*.

2 Stra. 634.

## CHAPTER CXCVII.

## CRIMES AND PUNISHMENTS.

ART. 1. *General principles.*

4 Bl. Com. 5.

§ 1. "A crime or misdemeanor, is an act committed or omitted, in violation of a public law, either forbidding or commanding it." Crimes and misdemeanors are, in fact, synonymous; but crimes generally signify higher, and misdemeanors smaller offences. Every public offence includes a private wrong. It affects the individual, and also the community. In capital offences, the private wrong is swallowed up in the public: but not always as to property in the United States.

1 Bl. Com.  
199.

§ 2. As every crime includes a private injury; and as every such injury is an invasion of personal rights and liberties, it may be proper first to pay some attention to these; and to form a correct, but concise view of these personal rights and liberties, thus violated, in a greater or lesser degree, in the commission of every crime. These personal rights are absolute and inherent: 1. "The rights of personal security consists in a person's legal and uninterrupted enjoyments of his life, his limbs, his body, his health, and his reputation. Life is God's immediate gift; begins as soon as the infant has a capacity to move itself in its mother's womb, and by nature is inherent. The right to enjoy life is unalienable; and it never can be taken away, but for the commission of some crime, to which the law of the land has previously annexed the punishment of death. A man cannot dispose of his life; though he may forfeit it, by committing a capital crime. Nor can one be punished with the loss of life, but by the express authority of law."

§ 3. So every man has a natural inherent right to enjoy his limbs, and every part of his person, securely, and free from all insults, assaults, beatings, woundings, and maimings. Therefore he may even commit homicide in defence of his life or limbs; and even his contracts and deeds, executed for a well-founded fear of death or mayhem, are void.

§ 4. So every person has a natural inherent right to have and enjoy his health and reputation securely; and in no manner to be subject to any practice or treatment prejudicial to his health or good name. Therefore, whenever his health is annoyed, or his reputation is injured, by slander or detraction, his natural rights are violated, and the law will punish the violation in every well-governed State. And whatever may be the

manner of the wrong to the individual, there must be a remedy to correct it. So as to offences against the public, whatever is indecent or immoral; whatever disturbs the public peace, or is of bad example, must be punishable, and generally is, by our statute or common law, as well as greater offences.

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§ 5. Personal liberty consists in the "power of removing one's person to whatever place one's own inclination may direct, without imprisonment or restraint, unless by due course of law." "This is a right strictly natural." It is the language of *magna charta*, the bill of rights, and of the petition of rights, and of all our constitutions, "that no freeman shall be taken or imprisoned, but by the lawful judgment of his peers, or by the law of the land." These all declare, that no man is to be restrained or confined by the mere discretion of any magistrate.

1 Bl. Com.

135, 136, 137.

"The confinement of a person, in any wise, is an imprisonment;" as keeping him in a private house against his will, or forcibly detaining him in the highway, or in any place from which he would remove himself, but for the restraint of another.

§ 6. And no imprisonment of a man's person can, usually, be lawful, but by process from some court of justice, or from some legal officer, having power to imprison. This process must, generally, be a warrant under hand and seal, expressing the causes of commitment; and if no cause is expressed, the gaoler is not bound to receive, or to detain the prisoner.

§ 7. Every man has a right, and it is a part of his personal liberty, to abide in his own country, or to leave it, as he pleases, unless sent out of it, or retained in it, by some known and express law. According to Judge Blackstone, exile and transportation are punishments unknown at common law; and there is no power to send a subject out of the realm against his will, but by act of Parliament, or by some express law. This is the case in the United States; no man can, against his will, be sent out of them, but by some known law, made by the people themselves, a part of their constitutions, or by their representatives, and a part of their statute law; and it is always in virtue of some such authority, that the president, or a governor, orders soldiers and seamen out of the United States, or of a State.

§ 8. "The third absolute right inherent in every Englishman, is that of property," which consists in the free use, enjoyment, and disposal, of all his acquisitions, without any "control or diminution, save only the law of the land." And by *magna charta* &c., no man can be deprived of his property, but by due course of law. This is equally law in the United States. Here, as in England, though a man's proper-

CH. 197. ty is derived from, and modified by, the society, it can never  
 Art. 2. be taken from him, but by some established law.

§ 9. To secure these essential rights, personal security, personal liberty, and private property, our constitutions are made, and our statutes enacted; our officers and judges appointed, and our juries preserved; and all their respective powers and duties defined in the most careful manner. It is also the right of the citizens to have arms for their defence, suitable to their condition, and such as are allowed by law.

§ 10. There are also, in every State, many relative rights and duties; as of parents and children; masters and servants; and of guardians and wards; of husbands and wives; brothers and sisters; and of teachers and scholars; of governors and governed; of superior and subordinate magistrates; and of aliens and natives, &c. The rights and duties resulting from these various relations, have their foundation in the law of nature generally, and ought ever to be held in high estimation by the law of the land; and every invasion of these rights, is also a crime to be noticed and punished by law.

§ 11. These rights and liberties here summarily noticed, have been, in preceding chapters, considered somewhat at large, but in a detached manner, and as applicable to different points and titles; as personal liberty, in considering arrests, imprisonments, writs of *habeas corpus* &c.; personal rights, in considering the rights of individuals, of parents and children, masters and servants, &c., &c.; and right of property, in considering the various kinds of title to property, origin of contracts, &c. Many matters in relation to crimes, have been considered under the heads of Evidence, Error, *Certiorari*, Libels, Usury, Inquest, Recognisance, Surety of the Peace, Aliens, &c., &c.

ART. 2. *Criminal law,—its vast extent and influence in every nation.*

§ 1. This law, or law punishing crimes, or criminal actions, regards almost all the actions of every person in the community, whether inhabitant, resident, or only passing in it. It begins with treason, in every shape, and extends to every petty trespass, fraud, or deceit, which includes or implies a breach of the peace, or a public injury, every act indecent, immoral, or of bad example; and it concerns every intermediate action, the public, by law, can prosecute and punish, even though only by fine of a cent. Crimes are often treated of in classes and under various names; as offences against God and religion, as blasphemy, profaneness, &c.; as offences against morality, as lewdness, intemperance, &c.; as offences against national law, as violating safe-conducts, the rights of public ministers, committing acts of piracy, &c.; as offences against the State,

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as treason, and sedition, misprisions, and contempts, felony, counterfeiting the public currency, embezzling public stores, serving foreign states, desertion, smuggling &c. ; as offences against the public polity of the state, to wit, offences against the public justice, public peace, public trade, health, public police and economy, &c. ; as offences against the public peace, as riots, and unlawful assemblies, affrays, forcible entries, going armed to the terror of the people, false news, challenges to fight ; as against the public trade, as smuggling, usury, cheating, monopolies, &c. ; as against the public health and police, as spreading infectious sickness, selling unwholesome provisions, marrying persons without or against law, polygamy, nuisances, not keeping schools by law required, idleness, gaming, &c., as many small offences punished with fines and penalties, as taking fish out of season, not serving in the militia, or as jurors, and in many offices.

§ 2. So crimes against individuals ; as murder, manslaughter, and other homicides ; rape, mayhem, sodomy, arson, burglary, robbery, forgery, larceny, and receiving stolen goods, false imprisonments, woundings, beatings, and assaults, kidnapping, embezzlements, burnings, and destroying property illegally.

§ 3. Various actions are made criminal, called heresy, withcraft, idolatry, sorcery, &c., and classed as being against religion.

§ 4. It may be convenient thus to class crimes and offences ; but by so doing we make the numbers of crimes, and the different kinds of them, appear to be much fewer than in fact the law makes them ; for instance, crimes against individuals are usually made to form one class, and in some dozen or fifteen heads or subdivisions ; but when we examine the statutes and laws that create and punish crimes against individuals, we find them very numerous ; also crimes are differently classed by different writers Beccaria says, crimes are of three sorts : 1. Such as are immediately destructive of society, as high treason : 2. Such as affect the lives, property, and honour of individuals : and 3. Such as are contrary to the laws that relate to the general good.

§ 5. As crimes and punishments, and criminal laws, are vastly important in every state ; and as in order to enact such laws wisely, and to punish properly, a profound knowledge of human nature, and of the motives that govern human conduct, and a constant attention to the opinions and maxims of the wisest men, on the subject, are required, it may be useful in a few pages here to collect some of the best of these opinions and maxims, and to make a few remarks on them ; useful, because whenever brought to mind, they lead the thoughts of the

CH. 197. legislator and judge, of the juror and all concerned, into the true course of thinking, legislating, and judging.

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ART. 3. *Maxims &c.* The maxims of wise men, which have long stood the test of experience and of examination, deserve attention, not only in executing the law of nature and reason, made by God himself, but also in making and executing the law of nations, and the municipal law of each State, enacted by civil rulers, or arising out of tacit consent, and a settled practice.

As the law of nature and reason is the oldest, and enacted by the Deity himself, and so the most obligatory, it is the true foundation of all law ; but then men ought to be constantly aware, that they are too apt to think *their own* notions, his will and his law ; or as one's own mind approves or condemns, so does he too often mistake its own for His decisions, as to what is right and what is wrong.

As men pass from a state of nature into a state of associated society, and then into society under a constitution, tacitly or expressly agreed to, and progress in this society, ever adding to their laws, as rules of conduct and of rights, by making new statutes and decisions ; it is in this course we properly consider the principles of law. We first properly view principles and laws as rules of human actions in a state of nature, and men in this state.

§ 1. In this, says Locke, all men are naturally in a state of perfect freedom, and also in a state of equality as to power, but not a state of license ; and each one is bound to preserve himself, and as much as may be consistent with his own preservation, to preserve the rest of mankind ; and that the execution of the law of nature is put into the hands of every man equally. But punishment may be inflicted so only as to serve for reparation and restraint, and belongs to every man by the law of nature ; but reparation is only to the injured party, and is his right. Hence, the magistrate in society, may often forgive the punishment, but not the private damage ; that no man can be forced to leave a state of nature without his consent ; and man's natural liberty is to be free from any superior power on earth ; and to have only the law of nature for his rule of conduct ; that the property of the world being given to all men in common, for their subsistence, each must have the means of appropriating a part to his support ; to make it of any use, and this is done by mixing his labour with it, and removing it out of a state of nature. The fish in the ocean are common, but he who catches one makes it his own. But the same law of reason dictates that a man shall not take from the common stock more than what he can enjoy or use : so in society, if twenty men own a turbary, or turf lot, and one digs

turf, it becomes his by the digging, though not especially assigned by the rest ; [hence, a crime in another to take it, though he might legally have first dug and taken this very part.]

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§ 2. Burlamaqui holds, the law of nature is a perfect rule, but is understood only by a right use of reason. As passion often has more influence than reason, it follows that men in a state of nature have but an imperfect knowledge of that law ; that a state of nature too, wants a common judge, acknowledged as such, to decide ; that *civil* liberty is preferable to *natural* liberty ; but this natural liberty is a man's right to dispose of his person and property as he thinks for his best good, within the limits of the law of nature, not abusing it to the prejudice of others ; but this power of self disposal, the civil state in part abridges ; that it is not so much the end of the law of nature to restrain the liberty of man, as to make him act for his best interest, by obliging each one to regard the rights of others, as thereby each has his own rights regarded. But where each one is free to injure others, each has no security or freedom at all ; and the civil state enforces this law of nature that binds each man to regard the rights of others ; that the civil laws of a state are those of nature modified and perfected in a manner suitable to it, and to the advantage of society ; that the commands of sovereigns manifestly against the law of God, natural or revealed, are not to be obeyed.

§ 3. In contemplating the law and state of nature, we perceive there are a few of the principles and maxims that ought to regulate human conduct. Superficially considered, they make many pleased with this state, as a state of much liberty in one sense ; but a little more attention will teach us that this state is in another sense, a state of despotism and wretchedness ; for if one man has liberty in it, to do much as he pleases, and to be his own judge, all others have the same liberty, and they will judge him and execute the law of nature upon him ; and again others have the same liberty to judge the judges, and to execute this law upon them ; and how will they do this coolly, and by an exact measure of right and justice ? Perhaps they will, when they feel no interest in the case, no passions, and keep themselves under a godlike self-government. But how often will this be the case ? Probably not one time in twenty ; then nineteen times in twenty, judgment, every one's business, disposed to make himself judge, will be with vengeance, in heat and passion ; and if one, in this state, in using his freedom, is supposed to have offended or to have committed a crime against the law of nature, all others being judges, not the cool and virtuous will first take the seat of judgment, and decide on his offence and punishment, but invariably the heated and passionate men. Hence, it is easy

CH. 197. to see what this poor freeman's liberty, so much extolled by  
 Art. 4. some, will be worth to him on the whole. Where the constitution and laws of society appoint no judge to decide, nine times in ten, the forward, the restless, the self-elected, and passionate, will take the lead, and assume the seat of judgment.

ART. 4. *The law of nations.*

§ 1. Each independent nation, say Lock and others, is in a state of nature, as to foreign nations; and therefore they are governed by the law of nature altogether, except in cases in which they have a settled usage, or conventional law. This law is part of the municipal law of every state. 7 Anne, c. 14.

§ 2. Natural law, says Burlamaqui, when applied to states, is called the law of nations,—is the law of God. The usages of nations bind as far as submitted to only; and until the nation expressly declares it will be bound no longer. This is law among nations by a kind of tacit convention. Burlamaqui also holds, that one nation has no perfect right to march its armies through the territories of another, without its consent: that one nation cannot rightfully employ men to betray or to act against another nation, at peace with it; and that the subjects of one nation cannot, without a prospect of doing, directly or indirectly, some good to themselves, do an injury to the subjects even of an *enemy* nation: but that every man, in a just war, acquires a property in what he takes from an enemy, and as soon as taken, as respects him. [Ch. 227, Captures.] That a “neutral nation ought to regard the two parties at war, as lawful proprietors of what they can take from each other by force of arms;” and that a neutral is not allowed to treat either party as an usurper:—that if immovables or lands pass into third hands, the original owner may endeavour to recover them, as well from such, as from the taker;—but if movables, not; because they may easily pass, by commerce, into neutral hands, without the buyer's knowing the state of the property. The tranquillity of nations; the good of commerce, and even the state of neutrality, requiring that they should always be reputed lawful prize, and the property of the person of whom we hold them [See Capture and Salvage; see Ch. 187, a. 18, r. 48 to 51.] And generally, whatever the law of nature enjoins upon individuals to do as a duty, or not to do, because a crime, the law of nations, so far as the law of nature applies to nations, enjoins upon them to do as a duty, or not to do a crime, in the intercourse of nations.

§ 3. The law of nations consists, 1. In the law of nature, applied to nations: 2. In settled usages long acquiesced in: and, 3. In conventions and treaties. These laws are in force

on many subjects, between any two nations, even small ones, their subjects and citizens, who have any intercourse. CH. 197.  
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§ 4. To have a full and correct understanding of this law of nations, (as well as of natural and municipal law,) it must be read and studied in numerous authors, treaties, and conventions, and as in force upon all the numerous subjects to which it applies. This law of nations, as operating on sundry subjects, has already been, and will be, considered in this work, in the consideration of those subjects; as in cases of captures, ransoms, and salvage, and some cases of the law-merchant, and in many insurance cases; in some cases, respecting fisheries, and the wealth of the ocean; in several cases in evidence, and relating to admiralty jurisdiction &c. And this law, on many other subjects, will be considered in future chapters; as in the cases of ambassadors, ministers, consuls, and other public agents, employed by nations in their intercourse with each other; of piracies &c. This law of nations has varied, from time to time, very considerably. Once, according to the law of nations, prisoners of war were made slaves, and usually carried into distant captivity; but according to the modern law of nations, especially among Christians, prisoners of war are merely detained for a time, treated well, and given up or exchanged.

§ 5. The law of nations is a part of the municipal law of each State, 1 Dallas, 114. And of the United States; and it allows every nation to be the arbiter and vindicator of its own rights. 4 Cranch, 514. And also it imposes on every nation the duty of restraining its own citizens from the commission of offences against all other nations, or of giving them up for punishment when guilty, and when impracticable, so to restrain them; 415.

§ 6. As to libels, in violation of the law of nations, the principle is laid down thus:—any publications, which tend to degrade, revile, and defame persons in considerable situations of power and dignity in foreign countries, may be treated as libels, and especially where they have a tendency to interrupt the pacific relations between the two countries. See *Rex v. Gordon*; *Rex v. Vint*; *Rex v. Peltier*; also the case of *Adel* in Philadelphia. Holt on Libels, 86 to 91.

ART. 5. *Municipal criminal law.* Many maxims and fundamental principles, part of this law, have been already stated in this work; especially under the heads of Evidence, Libels, Errors, and *Certiorari*, Amendments at Common Law, and Courts; and as a part of the rules of the Common Law, Ch. 187, a. 17, and as a part of the Maxims in Law, Ch. 187, a. 18; and in sundry chapters, as to Pleadings.

A few more will be added here, (with a few remarks,) selected from Beccaria, Lock, and others.

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§ 1. Criminal laws, especially, ought not to be the work of the passions, nor the result of fortuitous or temporary circumstances, but dictated by a cool examination of human nature, and enacted by men who know how to collect to one point, the actions of a multitude, and who have no end in view, but the public good.

§ 2. Nothing but laws can restrain the passions of men for any length of time; that is, laws forbidding and punishing every species of crimes. Beccaria.

§ 3. The intent of good laws is, among other things, to oppose an effort existing "in every human society," "tending to confer on one part the height of power and happiness, and to reduce the other to the extreme of weakness and misery." Id. Probably this effort exists in a less degree in the United States than in any country in which the law itself has established distinct orders of men.

§ 4. All punishments of crimes must be fixed by the law enacted by the legislature, which represents the whole society.

§ 5. The law is sacred, and the throne is as much bound to protect the cottage, as the cottage is to obey the throne.

§ 6. The force of law arises from the express or implied assent of the subjects; not binding, because certain ancestors made it. Beccaria.

§ 7. "Crimes are only to be measured by the injury done to society;" from treason against the state, to a petty trespass on an individual's property; "not by the intention; by whom it is committed," "nor by the dignity of the person offended;" "not on the sin of the heart, for that is impenetrable to men."

§ 8. "There is nothing more dangerous than the common axiom, *the spirit of the law is to be considered.*" It lets in a torrent of opinion, depends on the good or bad logic of the judge, his good or bad digestion, his passions, &c. Beccaria. This observation is just, if we are to understand by the *spirit of the law*, something different from its true meaning; but certainly not, if *spirit of the law* be its true meaning; for what is the true meaning of the law, and so of the law matter, is the material question every judge ought to ask, whether the law be criminal or civil, the law of God or man; and this true meaning fairly found, the execution ought to be strictly according to it.

§ 9. If the letter of the law be severe, the legislature should amend it. The judge should have nothing to do but to "determine whether the action be or be not according to the written law." Beccaria.

§ 10. Men, naturally independent, weary of war, and of a precarious liberty &c., make laws "the condition under which

they unite in society ;” and good laws “diffuse their influence universally and equally.” Id.

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§ 11. It is a general maxim, “that every member of society should know when he is criminal, and when innocent.” “If censors, and, in general, arbitrary magistrates, be necessary in any government, it proceeds from some fault in the constitution.” Id.

§ 12. Punishment cannot reverse the crime committed ; “and the end of it is only to prevent the criminal doing further injury to society, and to prevent others from committing the like offences.”

§ 13. Every rational being, whose ideas have some connexion with each other, and whose sensations are conformable to other men, may be a witness ; but his credibility will be in proportion as he is interested in declaring or concealing the truth. Id.

§ 14. “There was a time, when all punishments were pecuniary.” “The crimes of the subject were the inheritance of the prince ;” and the judge was the collector of the prince, rather than the minister of the law. Id.

§ 15. “All laws are useless, and in consequence destructive, which contradict the natural feelings of mankind.”

§ 16. Punishment ought to follow the crime as soon as possible ; “and the degree of punishment and consequences of the crime, ought to be so contrived, as to have the greatest possible effect on others, with the least possible pain to the delinquent.” The nearer the crime and punishment are brought together, the stronger and more effectual is the association in all common minds. Id.

§ 17. Some crimes relate to persons, others to property ;—the first ought to be punished corporally. The rich ought never to have it in their power to set a price on the security of the poor ;—there ought to be the same punishment for all. Id.

§ 18. “The infamy of many resolves itself into the infamy of none.” *Fanaticism glories* in persecution. “Infamy and ridicule only ought to be employed against fanatics.” Id.

§ 19. Crimes are more effectually prevented by the certainty, than by the severity, of the punishment. If the punishment be certain, the crime will not be committed, if the evil to follow be greater than the good to be expected from the commission.

§ 20. Servitude for life has a better effect on spectators, than death ; slaves suffer less than they imagine ; servitude is a perpetual warning,—death occasional ; death is pernicious, from the example of barbarity it affords. Id. Very sensible writers differ on this subject, and upon it public opinion has several times changed. Remark,—this opinion of Becca-

Ся. 197. ria, as to capital punishment, has been adopted but partially;  
 Art. 5. the better opinion has been otherwise, as to treason, murder, rape, and very atrocious crimes; so his opinion, that servitude has a better effect on spectators than death, as a punishment for crimes, may be questioned; certainly if he means a greater effect. So is our experience: when, in this State, a man indicted for burglary, was tried for his life, his trial attracted attention far and near, and his execution brought thousands to see it from great distances. Now such a criminal is only punished in the State prison,—his trial attracts no attention at all; his case is scarcely distinguished from that of a common thief, or that of any other criminal condemned to that prison.

§ 21. The prison before and after conviction, ought to be different; all sanctuaries are improper. Id.

§ 22. Smuggling is an offence against the nation; but not infamous in the public opinion. Id.

§ 23. "It is better to prevent crimes than to punish them." Id.

§ 24. "The preservation of *life* is a *natural* right,—the preservation of *property* is a right of society." Id.

§ 25. "The fear of the law is salutary, but the fear of man is a fruitful and fatal source of crimes;" and men enslaved are more voluptuous, more debauched, and more cruel, than those who are in a state of freedom. Id. Remark,—it is very clear that history and experience confirm both these positions; for instance, while the citizens of Rome were free, and feared the *laws*, and not men, they had a strong sense of character and much self-respect, and crimes were very rare; but when enslaved, they become servile, and debauched, and cruel, and crimes exceedingly multiplied; so in Greece and other countries. It follows, these important circumstances are to be attended to in making criminal laws.

§ 26. "Would you prevent crimes, let liberty be attended with knowledge." Id. Remark,—this maxim is unquestionably true, if this knowledge be accompanied with *competent means of living*, what no doubt is usually understood; but it may be well questioned if true, when this knowledge is attended with pinching and degrading poverty; for this knowledge is easily made the instrument of forgery, counterfeiting, cheating, and many crimes; so affords the temptation, by no means always to be resisted, when such a sense of virtue as there may be in many minds, has long and continually to struggle against strong temptation, aided and assisted by a bitter sense of poverty and want, with the high notion a good education usually gives, not well suited to a state of great penury. This maxim then ought to be extended, "would you prevent crimes, let liberty be attended with knowledge, also with the means of

employment and living;" and the next maxim deserves much attention, to wit :

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§ 27. A prospect to the industrious of bettering their lot, is a useful cement, and a vital principal of the state ; but this prospect, so preventive of crimes, cannot exist where employment is not to be had, or the government takes from the people, by taxes, much or most of their earnings.

§ 28. *Torture*. " The force of the muscles, and the sensibility of the nerves of an innocent person, being given, it is required to find the degree of pain necessary to make him confess himself guilty of a given crime." No torture among the Romans (except of slaves); nor among the English ; nor in Sweden ; nor in armies ; nor in the United States.

§ 29. The ancient Persians, to learn the value of law, passed, on the death of a king, five days in a state of anarchy, in which, of course, they experienced the evils of unrestrained crimes. Burlamaqui.

§ 30. Liberty, which comprehends the most precious goods, has two enemies, licentiousness, disorder, and confusion ; the other, oppression, arising from tyranny. The first arises from liberty itself, when it is not kept in due order ; the second from the remedy which men have contrived against the first evil, that is, from sovereignty. The great object is to guard against these two enemies ; the way is, to have a government formed with such precautions as to banish licentiousness, and not introduce tyranny. *Id.* Remark.—Here Burlamaqui seems to rely on the form of the government for the obtainment of this object, so very desirable. But clear it is, and so is experience, that a code of criminal law, well suited to the character and ideas of a people, and which, of course, they will readily and punctually execute, will contribute very much to the effecting of this great object. To this end, rulers ought to have a very perfect knowledge of the character, situation, and views of their people. A wise code of criminal law has a beneficial effect on the morals of the people, and it is "*good morals*" that properly regulate the state," especially among a free people, where "the only foundation of sovereignty" is their consent, and where they *ordain* and establish the forms of the government.

§ 31. All laws ought to be : 1. Conformable to the laws of God : 2. Easily followed and executed : 3. Useful and necessary : 4. Such as the subjects may rather be inclined to observe of their own accord ; and the reasons and motives which induce laws, should be made known : 5. Ought not to be changed without good reasons : 6. The dispensations ought not to be easily granted : 7. They should aid each other : 8. Each new law ought to regard times and circumstances : 9. Rulers, to enforce the laws, must well observe them them-

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selves : 10. If they may regulate religion, they have no power over consciences : 11. The human mind cannot bear inaction ; if not employed about something good, it will be about something evil. Remark,—every thing in these eleven assertions is very material to be attended to in all cases of crimes ; no one of them will wise and thinking legislators be inattentive to, especially in criminal cases, in which every illegal act of one man, however inconsiderable in turpitude, is not only an injury to another, and to the state, but also has a direct tendency to demoralize.

§ 32. The liberty of man in society is to be under no other legislative power but that established by consent in the Commonwealth, and under no law but that made by such power. Locke on Government.

§ 33. When men enter into society, they resign to it their power, severally, to judge of and execute the law of nature. Men saw, that to live by one man's will, became the cause of man's misery. Id.

§ 34. In a state of society, there is a common judge for men to appeal to, in order to settle their differences ; but there is none to settle a dispute between an absolute monarch and his subjects ; hence such a monarch and his subjects are, as to each other, in a state of nature. Id.

§ 35. The legislature, the supreme power, can have no more power than the individuals had, and "is bound to govern by promulgated standing laws, and known authorised judges." Id.

§ 36. When the people constitute a legislature, they delegate a positive power to make laws which cannot be transferred ; but this is only a *fiduciary* power, to act for certain ends, and when these are not answered, the people may alter their legislatures.

§ 37. The power to make laws has its original only in compact ; and a man's life can only be taken by forfeiture, and this by his making war on society. Id.

§ 38. But though, by engaging in an unjust war, a man may forfeit his life, he does not his property ; "for the property of the father is designed by nature and reason for the support of his innocent children." Id. This principle is, in substance, adopted in our Federal treason law.

§ 39. Among the great evils in a criminal code, the greatest is an arbitrary power to inflict fines and penalties for alleged offences. We have a striking instance of this in the Persian government, about A. D. 1600. The public tax was fixed on every town, a certain sum, limited and constant ; this the governor could not alter ; but as the mulcts, or fines for offences, were arbitrary, they, by discovering offences and crimes, perpetually pillaged the people of sums six times as much as

the public taxes, every year, in several towns; and the taxes could not be small in a government in which the king journeyed six hundred miles with all his seraglio, and a guard of sixty thousand men, to visit the tomb of a saint. Note. How far our common fines and penalties, which have no certain limitation, as to amount, and in some cases not as to the kind of offences, are arbitrary, is left for consideration; certain it is, as to these, our principal security is in the good characters of our judges.

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§ 40. No one can be guilty of a crime but one *doli capax*. A minor has not reason to dispose of his actions or property; hence he is under the direction of his parents, who are bound to take care of him, and preserve him till he have reason to govern himself. His freedom is founded on his having this reason; already considered, Chs. 3, 35, 93, 127, 178, &c. If an idiot, lunatic, madman, or one *non compos*, kill a person, and if a question be made, if so or not, his incapacity must be tried by a jury, in the presence of the judge; if found so, he cannot be tried; so if he commit a crime in his right mind, and become insane before trial, he cannot be tried; so if after trial, he cannot receive judgment.

1 Hal. P. C. 33.—2 Bl. Com. 291.—3 Mod. 301.—1 Hal. P. C. 34, 35.—4 Bl. Com. 24, Ch. 194, a. 1.

§ 41. All the individuals of a well governed state, are bound, like those of a well governed family, to conform their general conduct to the rules of propriety, good neighbourhood, and good manners; to be decent, and industrious, and inoffensive in their respective stations.

Bl. Com. 162.

§ 42. *De minimis non curat lex*.

ART. 6. *Punishments by our law generally*. Though punishments, applied to individual cases, are numerous, even in the United States, yet they may be conveniently enough classed under a few heads. Generally, though not always, a particular punishment is made applicable by particular statutes, to each particular case.

§ 1. *The kinds of punishment*. They are death, by hanging, in criminal cases, at common law; and death, by being shot, in some military cases, by the articles of war. 2. *Infamous* punishments, as gallows, pillory, state prison, branding, hard labour, and whipping, and some imprisonments: 3. Punishments not strictly infamous, as imprisonment, stocks, a species of imprisonment in the house of correction, also a species of imprisonment and fines. These several kinds of punishment are inflicted by various statutes of the United States, and of Massachusetts, and other States, and several of the second and third class, by the common law. Where very severe compared with the crime, they have ever been badly executed, as in England and other countries.

Act of Cong. Apr. 30, 1790.—Mass act.—4 Bl. Com. 370—2 Salk. 696.

1 Bl. Com. 7, 8, 17.

Not many distinctions in punishments are made with respect to the degree of the crime. Only murder is capital in Kentucky, act, Dec. 20, 1800, and this of the first degree, and defined by a subsequent act.

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to crimes *mala prohibita*, and crimes *mala in se*, though some authors make an important distinction, considering the latter as punishable by the law of nature ; and the right to punish as only transferred from the individual, who had it in a state of nature, to the constituted judge in a state of society. But as to the former, *mala prohibita*, the civil magistrate has a right to punish them, but by consent of individuals, who, in forming society, vested their power expressly or tacitly in the sovereign power in the state. Property, says Blackstone, is a mere civil right, therefore, the injuries to it, not touching a man's person or dwelling, are merely *mala prohibita* ; as a right to punish offences merely *mala prohibita*, against the municipal law only, and not against the law of nature, is by consent of those who form the society, and as no one for such offences, indifferent in themselves, can punish himself or others with death, it is doubted how far any human legislature has a right to punish such offences with death. If I cannot dispose of my life, can I (he asks) agree that another shall ; or can the legislature acquire a right to do it ?

1 Hal. P. C.  
13.

But Judge Hale gives a reason for varying the kind of punishment, and making it more severe, which has often prevailed. He observes, that "when offences grow enormous, frequent, and dangerous to a kingdom or state ; destructive or highly pernicious to civil society, and to the great insecurity and danger of the kingdom and its inhabitants, severe punishments, even death itself, are necessary to be annexed to laws in many cases, by the prudence of lawgivers, though possibly beyond the single demerits of the offence itself, simply considered." Hale was a practical man, as well as an able, humane judge ; and as the prevention of crimes is the main object of punishment, and what in a great measure justifies punishments, nothing, in his position above, is seen, inconsistent with sound principles, even those of Beccaria ; for he, and others of his good and humane disposition, admit that punishments must be made to conform not only to the nature of the crime, but also to times and existing circumstances. But extremes are not intended ; and it is true, as Blackstone observes, that "though the end of punishment is to deter men from offending, it never can follow from thence, that it is lawful to deter them at any rate, or by any means ; since there may be unlawful methods of enforcing obedience, even to the justest laws." Only extreme variations in punishments are here objected to.

4 Bl.Com. 10.

4 Bl.Com. 12.

§ 2. *The end of punishment.* This is a precaution against future offences of the same kind. This is effected in three ways : 1. By the amendment of the offender himself, for which purpose all corporal punishments, fines, and temporary exiles and imprisonment are inflicted : 2. By deterring others by the dread of this example from offending in a like way :

3. By disabling the offender from offending again, by putting him to death, or by condemning him to perpetual imprisonment, slavery, or exile. These four last never ought to be inflicted except where the offender appears incorrigible, which may be collected from a repetition of minuter offences, or from the perpetration of some one crime of deeper malignity. These are, in substance, the principles adopted by Beccaria, Burlamaqui, &c. ; and they seem to be the true ends of punishment, not difficult to be seen and understood. The difficulty lies in discovering and enforcing the true means, ever to be adapted, with judgment, to the existing state of things in the society in which the punishments are to be inflicted.

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§ 3. *Some general variations in punishments.* When our country was first settled, there were many more capital and infamous punishments, than exist at present ; probably because our ancestors came from a country in which these were very numerous. Sometime since there were no less than one hundred and sixty different offences in England made felony, and without benefit of clergy. In Massachusetts Colony, about A. D. 1650, there were seventeen crimes at least, punished capitally, to wit, idolatry, witchcraft, blasphemy, murder, manslaughter, poisoning, bestiality, sodomy, adultery, manstealing, false witness, treason, cursing and smiting parents, rebellious and stubborn sons, rape, Quakers returning, and Jesuits returning : and the same in Connecticut and New Plymouth. In Massachusetts, in the year 1790, there were but seven, to wit, treason, murder, rape, sodomy, robbery, burglary, and arson ; including only four of the said seventeen ; and since, only part of these crimes are capitally punished. So punishments have been varied in other respects ; the pillory, gallows, whipping, and branding have almost disappeared, and solitary imprisonment, and hard labour in state prisons, having been generally substituted in their place, as also much in the place of capital punishments. So punishments of the same crimes have materially varied in other countries. By the *Porcian* law, capital punishments were abolished in Rome, but restored by the emperors : about A. D. 1764, were abolished throughout the vast dominions of Russia.

4 Bl Com. 18.

Corporal punishment in the army of the United States, was abolished by this act, as it was inflicted by " stripes or lashes." Act of Massachusetts of February 27, 1813, enacted, " That whenever any person or persons, shall or may be prosecuted to conviction, before the Supreme Judicial Court of this Commonwealth, for any crime or misdemeanour which is now by law punishable by whipping, standing in the pillory, sitting on the gallows, or imprisonment in the common gaol of the county, such court may at their discretion, in cases not already

Act. of Cong  
May 16, 1812,  
sec. 7.

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provided for, in lieu of the punishments aforesaid, order and sentence such convict or convicts to suffer solitary imprisonment for a term not exceeding three months, and to be confined to hard labour for a term not exceeding five years, according to the aggravation of the offence."

4 Bl. Com.  
20, 26.

§ 4. *Persons not punishable &c.* Every person is liable to be punished for any public offence committed, unless there be a want or defect of will. "To constitute a crime against human laws, there must be, first, a *vicious will*: 2. An *unlawful act* consequent upon such vicious will." There are three cases in which this will does not join in the act: 1. Where there is a *defect of understanding*, as in cases of insanity, idiocy, lunacy, and intoxication: 2. Where there is understanding and will, but not called forth, as in cases of *misfortune and ignorance*: and 3. Where the action is *constrained* by some outward force, as compulsion and necessity; and a vicious will without a vicious act, is no civil crime.

1 H. P. C.  
20, 27.—  
Dalt. Just. c.  
127.

§ 5. *Minors.* The law does not punish minors under twenty-one years of age, in certain small offences, particularly in cases of omission, as not repairing a bridge, a highway, &c.; for he cannot command his estate; but for a breach of the peace, a riot, battery, &c. a minor above fourteen years old may be punished; but under seven years of age, an infant cannot be guilty; but between seven and fourteen years of age the capacity only is regarded; hence, one eight years old may be guilty of a crime and punished. But under fourteen, a minor, *prima facie*, is deemed *doli incapax*; "yet if it appear to the court and jury, that he was *doli capax*, and could discern between good and evil, he may be convicted and suffer death." A girl of thirteen was burnt for killing her mistress. One boy of ten, and another of 9, for killing their companions, were sentenced to death, and he of ten hanged, because it appeared on the trial that one hid himself, and the other hid the body.

1 Hal. P. C.  
18, 21, 25.

*Pubertas*, generally, as to crimes and punishments, is fourteen years as to male and female. And when a fact is made felony or treason, it extends as well to infants, if above fourteen, as to others.

1 Hal. P. C.  
20, 28.—4  
Bl. Com. 24.

In cases not capital, the court judges of the capacity of all minors. Where the punishment enacted is collateral, it shall not be extended to the minor, as where a minor eighteen years old was convicted of a disseizin by force, yet not imprisoned, yet in such case a *feme covert* is imprisoned. There shall not be a judgment against a minor of *capiatur*, or in *miseriordia, pro falso clamore*. The law will admit no evidence to prove a minor, under seven years of age, *doli capax*. A boy eight years old was hanged for burning a barn at Abingdon. But

the malice, in such cases, which is to supply age, ought to be  
 strong and clear, beyond all doubt. Ch. 197.  
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§ 6. *Chance*. In things casually done, there is difference  
 between *civil* and *criminal* matters; as "if a man be shooting  
 in the fields, at rovers, and his arrow hurt a person standing  
 near the mark, the party hurt shall have his action of trespass,  
 and recover his damages, though the hurt was casual; for the  
 party is damaged by him, and the damages are but his repara-  
 tion; but had the party been killed, it had been *per infortu-*  
*nium*." In a criminal view, if the act that is committed be  
 simply casual and *per infortunium*, regularly that act which,  
 were it done from intention of mind, were punishable with  
 death," is not to be punished. If one be doing a lawful act,  
 and death ensues by accident, there is no crime committed;  
 but otherwise, if doing an unlawful act. 1 Hal. P. C.  
38, 39.  
4 Bl. Com. 26,  
27.

§ 7. *Ignorance*, see Ignorance, considered; and *mistake*,  
 see Mistake, Ch. 186, a. 11.

§ 8. *Necessity*. Often when an act is done of necessity,  
 the party doing it is not punishable. As where it is done to  
 preserve the public peace; as if a thief resist, and the pur-  
 suers kill him, it is no felony, as it is of no necessity. The  
 same of rioters, where killing them cannot reasonably be  
 avoided; as in such cases it is of necessity to preserve the  
 public peace and order. Grotius and some others say, that  
 in cases of extreme necessity, all things are common; this  
 Hale denies to be the case, especially in England, where the  
 poor laws provide for the necessitous. If a ship want neces-  
 saries, the crew may take them from the inhabitants, paying  
 for them, and this by a common consent of nations. But this  
 cannot be done by English seamen on the English shores, for  
 there they may apply to the magistrate. So I may, of ne-  
 cessity, supply an enemy come upon my estate, or near to it,  
 to prevent his plundering. Every case of necessity must de-  
 pend on its peculiar circumstances. 4 Bl. Com.  
31, 32—  
Hale's P. C.  
53, 58.

§ 9. *Civil subjection*. An act done by force thereof, is  
 often no crime on that account; though, otherwise, it would be  
 one. As where an officer, or other, is commanded by law to  
 do this duty, and death ensue, it is no crime.. The same as  
 to a child to his parent, a servant to his master, and a wife to  
 her husband. But the command of a parent, or of a master,  
 to commit a crime, is void. As punishment is inflicted only  
 "for the abuse of that *free will*, which God has given to man,  
 it is highly just and equitable, that a man should be excused  
 for those acts which are done through unavoidable force and  
 compulsion." Of this nature is *civil subjection*, "whereby  
 the inferior is constrained by the superior, to act contrary to  
 what his own reason and inclination would suggest." "As 1 Hale's P.  
C. 44, 48.—  
4 Bl. Com.  
27, 31.

Ch. 197. when the legislator establishes iniquity by law, and commands the subject to do an act contrary to religion or sound morality."

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"Obedience to the laws in being, is undoubtedly a sufficient extenuation of civil guilt before the municipal tribunal," whatever excuse there may be or not, *in foro conscientiae*. The sheriff who burnt Latimer and Ridley, was not liable to punishment, being justified by the commands of the magistracy of Queen Mary.

As to persons in private relations;—the principal case, where constraint of a superior is allowed as an excuse for criminal conduct, is that of a wife; for as to a son or a servant, he is not excused committing a crime, capital or not, by the command or coercion of the parent or master. But if a wife commit burglary, by the command, or even only in company with her husband, she is excused; as she is viewed as acting by his compulsion. But even as to wives there is an exception as to crimes *mala in se*, as murder &c.; also as to treason, and keeping a bawdy house. So if she offends alone, and without the company and command of her husband, she is responsible for her offence, as much as a *feme sole*.

As to this *civil subjection*, the law, on the whole, is very unsettled, in several respects, especially as to the officer and the wife. As to the servant and child, it is held by Hale and Blackstone, that if either of them commits treason or felony, by command of his master or parent, the offence is neither excused or extenuated, as to the punishment; for the command is void, and against law; and the latter holds, that the child or servant is as much a free agent, as any other person.

As to the officer, Blackstone holds, that he is not liable to punishment for executing a cruel and arbitrary sentence as above, in the case of Latimer and Ridley; but Hale has doubts, and Fineux C. J. and other judges, differed. On a view of many authorities, if there be any general settled rule, it is this, namely: if the officer, in the course of the duty of his office, execute a sentence, cruel and arbitrary, and so deemed, by those who try him, as a cruel star-chamber sentence, for instance, he is not punishable where that sentence is given by a tribunal, duly appointed by the government or sovereign authority for the time being, and even though only the government, *de facto*, and even though a mere usurpation, as officers who executed the warrants and sentences, given in Cromwell's time, by the appointed authorities.

§ 10. As to the *wife*: 1. She is punishable if she commit any crime alone and of her own accord, and no way coerced by her husband. On this point, the authorities are agreed generally. 2. She is punishable if she commit a crime with

1 Hale's P. C. 44.—Dalt. Just. ch. 159.—4 Bl. Com. 28.

1 Hale's P. C. 44.—16 H. VI.—4 Bl. Com. 29.—1 H. VII.—4 Bracton, lib. 3. ch. 9.—3 Co. Inst. 56, 60.

1 Hale's P. C. 44, 45, 46.—4 Bl. Com. 27, 31.—1 Haw. P. C. 2.—Kril. 31.—Bracton, de corone, ch. 32, s. 9.—Staunf. P. C. 102.

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her husband, where she is the principal actor, as in keeping a bawdy-house, and in other affairs where she has the principal influence. 3. She is punishable, if she, with him, commit treason, or murder; in regard to the heinousness of the crime, though by his command or coercion; as in the case of Arden, his wife was attainted of treason, though she only assented to her husband's treason, and was not an immediate actor in it, and so principal in the second degree. So Somerset and wife were both attaint, as accessaries before, in the murder of Sir Thomas Overbury. 4. She is not punishable, if she commit larceny by the coercion of her husband, if he be present; but is punishable, if he be absent at the time and place of the felony committed; as then she is not under his coercion. 5. If she, with him, or by his coercion, commit a crime, merely *malum prohibitum*, as merely against or upon property not a dwelling-house, she is not guilty or punishable. 6. If she commit *burglary* with him, or by his coercion, it is doubtful if she is punishable; some judges have been of opinion, she is; and Hale thinks she may be guilty, unless the actual coercion of the husband appears. But he says, "the latter practice hath obtained, that if the husband and wife commit *burglary* and *larceny* together, the wife shall be acquitted." Here *burglary*, a crime against one's dwelling-house, and *larceny*, a crime on property only, are confounded. The latter is *malum prohibitum*, according to some. But Blackstone, (1 Bl. Com. 54,) not only considers murder *malum in se*, but also *theft* and *perjury*; of course, one would think, *burglary* and *stealing*, are *mala in se*; and as he holds, (4 Bl. Com. 29,) a wife is not excused committing a crime *malum in se*, with, or by coercion of, her husband, and prohibited by the law of nature; as murder and the like; "not only because these are of a deeper dye, but also, since in a state of nature, no one is in subjection to another, it would be unreasonable to screen an offender from the punishment due to natural crimes, by the refinements and subordinations of civil society." Now if she is not excused a crime *malum in se*, as above, and theft is *malum in se*, as above, this author says it is; it seems to follow directly, that she is not excused committing theft with, or by the coercion of, her husband. Yet, 4 Bl. Com. 28, he says, "if a woman commit theft, burglary, or other civil offences against the laws of society, by the coercion of her husband, or by his command, which the law construes a coercion; or even in his company, his example being equivalent to a command; she is not guilty of any crime; being considered as acting by compulsion, and not by her own will:" cites Hale's P.C. 45. All these positions are found in the same eminent author in the same work. In

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short, says he, theft is a crime *malum in se*. The wife is not excused a crime *malum in se*, yet the wife is excused *theft*. It is clear, this conclusion does not follow from the premises. But still we are to enquire, which part is to be denied, the major or minor proposition; and the author himself has told us which; for, (4 B. Com. 9,) he observes, punishments are sometimes inflicted without God's express warrant or example, but "at the will and discretion of the human legislature; as for forgery, for theft, and sometimes for offences of a lighter kind. Of these we are principally to speak:—as these crimes are none of them offences against natural, but only against social rights; not even *theft* itself, unless it be accompanied with violence to one's *house* or *person*." Here he makes *theft* itself *malum prohibitum*; not against *natural*, but only against *social* law, if not accompanied by violence to one's *house* or *person*. But is this true, that *theft* is not against the law of nature? In another place, the same author says it is; and surely if ten men be cast on a desolate island, from ten different nations, and in a state of nature, on this island, as they must be, till they settle some government among them; and in this state of nature one of them takes a fish from the great ocean for his support, for another to steal it from him, is a violation of the law of nature; and *theft* is expressly forbidden by the law of God, given to the Jews. I think, on the whole, the minor proposition is to be denied, which proposition is, that "the wife is not to be excused a crime *malum in se*," committed with her husband. This was not to be denied in ancient times, when a wife was punished for theft and burglary committed with her husband, (1 Hale's P. C. 44,) but is now to be denied, since, in favour of life, and the reasons mentioned by Hale and others, she is to be excused such crimes committed with him; for Hale, Blackstone, and others agree, that by *modern* practice, the wife is excused even *burglary*, committed with her husband; and one reason given, is, she might otherwise be executed, where he would have his clergy for the same crime. And in the very clause in which Blackstone makes *bare theft* only *malum prohibitum*, as above, he makes burglary *malum in se*, because it is also a violation of one's house; and surely, to violate one's cave, in a state of nature, in which he lives and sleeps, is a violation of the law of nature, so *malum in se*. So, on the whole, we may conclude, that burglary and theft are crimes *mala in se*. Burglary clearly by the law of nature, and theft, if not clearly so by that law, yet is expressly against God's law, given in the eighth commandment, and the wife was, anciently, punished accordingly for violating these laws. But, in more modern times, some difficulties having arisen out of the acts allowing benefit of clergy, and

a disposition having prevailed to err on the side of humanity, the wife has been excused crimes *mala in se*, as burglary and robbery especially, committed with, or by coercion of, her husband, as a matter of modern practice, disregarding the old maxim, that the wife could not be excused such crimes. But if husband and wife jointly commit manslaughter, (*malum in se*), she is not privileged by her *coverture*, though he has his clergy. 1 Hale's P. C. 46. And as an indictment against both, is, in its nature, several, as well as joint, either may be acquitted, and the other convicted. Id. And if he commit treason, or felony, and she knowingly receives him, she is not guilty, or punishable; for she is *sub potestate viri*, and she is bound to receive him; but otherwise, if he knowingly receive her, after an offence of this nature, committed by her. She alone, and without him, may be accessory to a felony after the fact. 2. She cannot, *with him*, be accessory to a felony after the fact, as it shall be adjudged his act. 3. In case she receive her husband, a traitor, she shall not be adjudged one: nor, 4. If she, jointly with him, receive any other person, that is a traitor, unless she were also consenting to the treason, "for it shall be entirely adjudged the act of the husband." 5. She may be guilty of *misprision* of treason, committed by another man than her husband. 6. If she consent to his treason, she is guilty as a principal, though it is a question if she can, in regard to her husband's treason, be guilty of *misprision*.

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1 Hale's P.C.  
47, 48.

§ 11. *Duress pre minas*. This is another species of compulsion or necessity; but the threats and menaces must be such as to induce a fear of death, or other bodily harm, to take away guilt; and this fear, which compels a man to do an unwarrantable act, ought to be just, and well grounded, and such as will move a man of common firmness and constancy. Hence, one in a time of war or rebellion, may do many treasonable acts by compulsion of the enemy or rebels, which would admit of no excuse in a time of peace. This is true, however, only as to crimes *mala prohibita*, but not as to natural offences, so declared by God's law. Therefore if one be violently assaulted, and cannot escape but by killing an innocent person, and he kills him; the fear and force shall not acquit him of murder; but he may kill the assailant; "for the law of nature and self-defence, its primary canon, have made him his own protector." To justify supplying rebels, it must be done from a just and well founded fear of death; but those so acting from fear, must cease to supply them as soon as they can. If A, on just grounds, fears that B will kill him, and is assured he provides weapons, and lies in wait so to do; yet this threatening conduct is not enough to justify A's killing B, without an actual

4 Bl. Com.  
30.—1 Hal.  
P. C. 49, 50.

1 Hal. P. C.  
52.

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 Art. 7. fact; but A must avoid the danger; for bare fear, though for  
 just cause, and though on a fear of life, does not give one  
 power to take away another's life; but it must be an actual  
 and inevitable danger of one's life, to justify killing another;  
 for the law hath provided for him by flight, and recourse to the  
 civil magistrate for protection, by security of the peace. On  
 the whole, it must be the actual and manifest saving of A's  
 life, that will justify his killing B, and he must be an assailant,  
 and not an innocent person. So as to chastity, limbs, and one's  
 house; the danger must be actual and manifest, and threatened  
 by the person killed, to save either inviolate.

ART. 7. *Malice.*

§ 1. This is very material in estimating crimes and punishments, and even trespasses and torts in civil actions, in many cases, especially in regard to damages. *Trespass* or other *tortious* acts, *maliciously* done or committed, ought to subject the wrong-doer to greater damages than one *negligently* committed, and without malice; and in *criminal* cases, the crime usually depends materially on the circumstance of *malice*, or *no malice*. Hence, it is essential to see what *malice* is, and how the guilt or enormity of the action is increased by it.

2 Rol. R. 461.  
 —4 Bl. Com  
 199.—East's  
 C. L. 224 &c.

§ 2. The best authors define *malice* to be a *disposition to do an evil thing*,—"une disposition a faire une male chose;" and this malice may be: 1. *Malice afore-thought*,—that is, *malitia præcogitata*, or *malice prepense*, or *malice of set purpose*: and to make the act done with *malice*, murder, or *malicious* trespass, &c. the malice may be not only spite or malevolence to the person killed or injured, but also an *evil design in general*,—a design to do an unlawful act, knowingly in fact, or by presumption of law. Hence, Parker C. J., said, "malice, in common acceptation, is a desire of revenge, or a settled anger against a particular person;" "*malice* and *maliciously*, I take to be terms of law, which, in a legal sense, always exclude a just cause." In murder, "malice stands in opposition to cases of reasonable provocation; such as might move an honest and good man; and the court, and not the jury, have ever determined of malice;" therefore, where one has a *just cause*, and kills a man, as in self-defence &c., it is said not be of malice, the motive and design, in such case, of him who kills, is to save his own life, not to satiate his revenge, or angry passions, towards an individual, or to do an unlawful evil act generally; as a wicked design or intent towards men generally, as deliberately discharging a gun among a multitude of people. So it is general or universal malice, for one to resolve to kill the next man he meets; and if he kill him, it is murder with *malice afore-thought*, though he did not know him. So any evil in-

Gib. cases,  
 190, 194.—2  
 Inst. 384.

4 Bl. Com.  
 200.

1 Haw. P. C.  
 74, 84.

tent to do an unlawful act, is malice, and if, in doing the act, a person is killed, it is murder, with malice *prepense*, if the evil design be to do an *unlawful* act against the peace, the *probable consequence* of which may be *bloodshed*, or the intent be to commit a *felony*; but not murder, if one be so killed where the design is only to commit a *trespass*, not probably attended by *bloodshed*. But if two or more agree to beat a man, or to commit a riot, and one of them, in doing the act, kills a person, all are guilty of murder, because of the previous evil intention to do an unlawful act, *probably attended by shedding of blood*.

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§ 3. 2. Malice may be *express* or *implied*; *express*, as if one form a deliberate design to kill a man, and kills him; this is malice *express*, and murder, and is evidenced in many ways, as in duels, lying in wait, &c.; so it is *express malice* and murder, if A, even on a sudden provocation, beats B in a cruel and unusual manner, so that he dies, though he did not intend death; for here is an *express evil design*; as where the park keeper found a boy stealing wood, and tied him to a horse's tail, and he was killed; held, it was murder by *express malice*. So where a master corrected a servant with an iron bar, and killed him; held, this was murder, because such excessive correction could but be attended probably by death or bloodshed, and could proceed but from a wicked heart. Hale says, *malice, in fact*, "is a deliberate intention of doing some corporal harm to the person of another;" 1 Hal. P. C. 451; not authorized by law.

4 Bl. Com. 199.—1 Hal. P. C. 454, 473, 474.—Cro. Car. 131, Halloway's case.—W. Jones, 198.—Kelynge, 127.—Palm. 585.—Foster's Crown Law, 262 &c.—East's C. L. 237.

§ 4. *Implied malice*. In many cases in which there is no *express malice*, the law implies malice; as if A wilfully poisons B, the law presumes malice, though no particular enmity can be proved. So if A kill B suddenly, without provocation, "the law implies malice;" for no person but one of a wicked heart, would be guilty of such an act, on a slight, or no apparent provocation or cause. So the law implies malice in A, if he kill an officer of justice, civil or criminal, in the execution of his duty, or any of his assistants, endeavouring to conserve the peace, or any private person endeavouring to suppress an affray or apprehend a felon, knowing his authority, or the intention with which he interposes, and the killing is murder; so it is murder wherever one kills another without a just cause, and the law implies malice, as for an affront by words or gestures only; but not if the person thus affronted, kill the offender, meaning only to beat or chastise him; and Judge Blackstone says, "all homicide is presumed to be *malicious* until the contrary appeareth upon evidence;" and cites 1 Hal. P. C. 466.

1 Hal. P. C. 455, 457.—4 Bl. Com. 200, 201.

2 Cro. 279, 280, case of Mackaley.

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Kelynge, 119,  
138, Maw-  
gridge's case.  
—East's C. L.  
276.—1 Haw.  
114.—1 Hal.  
P. C. 425,  
in notes.—  
Fost 278.—2  
Ld. Raym.  
1493.—1  
Hawk. c. 31,  
s. 28.

§ 5. This was a strong case of *implied malice*, so held to be by all the judges of England, except *Trevor C. J.* on a special verdict, in which it was found, the deft., Mr. Cope, the deceased, and a woman of his acquaintance, were present in the guard room, and the deft. affronted her, and angry words passed between them, in the presence of Cope and others; the deft. threatened her; Cope desired him to forbear such treatment of her, saying he must protect her; the deft. continued his ill language to her, and demanded satisfaction of Cope, intending to provoke him to fight; Cope told him it was not a convenient place to give satisfaction, but he, at another time and place, would be ready to give it, and in the mean time desired him to be civil, or leave the company. Thereupon the deft. rose up, and was going out of the room; and so going, did suddenly snatch up a glass bottle, full of wine, then on the table, and violently threw it at Cope, and struck him on the head, and immediately drew his sword; and immediately Cope rose up, and took another bottle, on the table, and threw it at the deft., and hit him, and broke his head; but Cope had no sword; and said not a word after the deft. threw the bottle; and immediately on Cope's throwing the bottle, the deft. thrust him into the left breast, and instantly killed him. Held murder, and that malice was implied; because the deft. threw the bottle at Cope without any provocation given to him; for Cope might well desire the deft. to leave the room, where he was only a guest to Cope, and there by his permission. In this case, a distinction was taken between *envy*, *hatred*, and *malice*. Envy was defined to be "a repining, or being grieved at the happiness and prosperity of another"—"*invidus alterius rebus macrescit opimis.*" *Hatred*, which is *odium*, is "*ira inveterata*, a rancour fixed and settled in the mind of one towards another," and is of several degrees." "*Malice* is a design formed of doing mischief to another;" "*cum quis data opera male agit*, he that designs and useth the means to do ill, is *malicious*;" cites 2 Inst. 42;" "and he that doth a cruel act voluntarily, doth it of malice prepensed;" cites 3 Inst. 62. And Coke says, if one cut out the tongue, or put out the eye of another, he is guilty of felony, though he do such mischief of a sudden, and *the law implies malice if he voluntarily do it*. Also held, that Mawgridge, by throwing the bottle, manifested a *malicious* design, and then Cope's returning a bottle, had no influence upon the case; for as Mawgridge had his sword drawn, also Cope had a right to throw the bottle in his defence; and if he had wounded Mawgridge, he might have justified in an action of assault and battery; so no provocation to Mawgridge to stab him. Mawgridge's throwing the bottle, was proof of malice; it was a violent act, and if it had killed Cope, it had been clearly mur-

der. And so resolved, if A, of *malice prepense*, assault B, to kill him, and B draw his sword, and attack A, and pursue him; then A, for his own safety, retreat to a wall, B still pursuing A, with a drawn sword, and A, in his defence, kills B, this is murder in A; for A having *malice* against B, and in pursuing thereof, endeavouring to kill him, is answerable for all the consequences, of which he was the original cause. "When a man attacks another with a dangerous weapon, without any provocation, that is *express malice*, from the nature of the act, which is cruel." "The definition of *malice implied*, is where it is not express in the nature of the act; as where a man kills an officer that had authority to arrest his person; the person who kills him, in defence of himself from the arrest, is guilty of murder, because the *malice is implied*,—for properly and naturally, it was not malice, for his design was to defend himself from the arrest."

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§ 6. 3d. *Malice depends much on the provocation, or no provocation*; for if A, for a reasonable provocation, strike B, and kills him, it is not malicious, and no murder; as if a parent or master be provoked to a degree of passion, by some improper behaviour of a child or servant, to correct him with a moderate weapon, and unluckily kills him, it is but a *misadventure*; but if with an *improper weapon*, and the child or servant is killed, it is murder, and *malice prepense is implied*; that is, murder, if the weapon or the manner may probably kill or maim; but manslaughter, if only a cudgel, or other weapon not likely to kill or maim; so if the manner be not likely to produce death or *mayhem*; manslaughter, because the weapon or manner is *improper*, though not likely to produce the loss of life or a limb. Here the law makes three distinctions: 1. If the master correct his servant with a *proper* weapon or instrument, and death happens to ensue, it is by accident, and not malicious, if done too in a proper manner: 2. But if with *improper* instruments, or in an improper manner, though not likely to kill or maim, but death does ensue, it is manslaughter, because there is a want of caution and care, but no malice prepense: 3. If with *dangerous* weapons, likely to kill, then murder, where death ensues; because the weapon is a dangerous one, and the very use of it is cruel, and therefore *malice is implied* in the use of it. This last was Gray's case, who being a smith, and B. was his servant, he directed B. to mind certain stamps belonging to his trade; afterwards he and his servant being at work, at the anvil, Gray asked him if he had minded the stamps; B. said he had not; on which Gray was angry, and told him, if he would not serve him, he should serve in Bridewell; B. replied, he had as good serve in Bridewell as serve him; whereupon Gray took the iron bar, on which they

Foster's  
Crown Law,  
262.—  
Kelynge, 133,  
134—1 Hal.  
P. C. 434,  
474.

Kelynge, 133,  
Gray's case.

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were working, and struck B. with it upon the skull, and broke it, of which stroke B. died. Adjudged murder: "yet here was a *provocation*, on a sudden, as sudden as resentment, and as speedily putting it in execution;" for though Gray might correct his servant, "both for his negligence and want of manners, yet as the use of the iron bar was using a dangerous weapon, and exceeding all reasonable bounds, the act was deemed *malicious*, and so murder &c., though there was some provocation, and suddenly, but it was a provocation of neglect, and of words, both of which did not justify the use of such a weapon. This leading case proves, that though there was a *sudden provocation*, yet the person provoked, was bound to have self-command, and to use only a proper weapon of correction; that he uses an improper and deadly one at his peril; and that, as it was one likely to kill or maim, the law implied *malice* in the act of using it, or rather the act was evidence of express malice, as the master might reasonably expect a blow with it would kill or maim the apprentice; and this was the mischief the master was bound, in all events, to guard against, where not acting in self-defence. In this case, the servant acted improperly, negligently, and provokingly; and the master honestly and correctly, till he took the iron bar to strike; so that he, strictly speaking, could not have *premeditated malice*; yet as he unlawfully used, though suddenly and provoked, a deadly weapon, this very act, in contemplation of law, was proof of malice, of a wicked heart, of evil design, of "*une disposition a faire une male chose.*" All the books agree, that no words or gestures, *however provoking*, will justify one in using a dangerous weapon for correction, or a dangerous mode; so this case of Gray's proves, that *neglect of duty* in a servant will not justify any but moderate correction, with a proper instrument. The same principles hold in regard to obstinate and perverse children; their ill actions are a *great provocation*; yet if parents, in correcting children, exceed moderation, and kill them, it will be murder with malice prepense; as if a child be thrown down, and stamped upon, or a heavy cudgel be used in the chastisement. But according to Judge Blackstone, if A use provoking and insulting words or gestures to B, and he chastise A in a *moderate manner*, and in a way, and with a *weapon no way likely to produce the loss of life or limb*, and A's death is accidentally, and in a manner wholly unexpected, occasioned, this is only manslaughter at most, and the law does not imply malice afore-thought. So a bare trespass on a man's property, (except an attack on his house), as an entry on his land, or beating his dog or horse, is no such provocation as will exclude or extenuate his malice, if he kills the trespasser; for a bare trespass on my property, by a man, is no sufficient

4 Bl. Com.  
199, 200,  
206.—1 Haw.  
125.—Fost.  
261.

provocation to justify or even to excuse my taking, or even endangering his life. CH. 197.  
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§ 7. *Sufficient provocation to exclude or to extenuate malice.*

1. If one man, upon angry words, make an assault on another, either by pulling him by the nose, and the one so assaulted, shall immediately draw his sword, and kill the assaulter, this is but manslaughter, as the peace is broken by him, and with indignity and insult to the party assaulted. Here is a sudden provocation, sufficient to move a cool man, and the one so assaulted has reason to think the assaulter has a further design upon him; and his rude, provoking, and unlawful conduct, is proof of an evil design, and so of malice. Kelynge, 135.  
—1 Haw.  
117, 125.—1  
Hal. P. C.  
470.—Style,  
467.

§ 8. 2d. If one be imprisoned illegally, and kill the aggressor, it is *with provocation*, and not murder. As where A was indebted, and B and C came to his house, on account of the debt, to demand it, and B took a sword that hung up, and stood at the door with it, undrawn, to keep A, the debtor, till they could send for a bailiff, to arrest him; thereupon A took a dagger from his pocket, and stabbed B. Held, only *manslaughter*, for A, the debtor, was insulted, and imprisoned injuriously, without process of law; and so there was sufficient provocation for the act, and to exclude any implication of malice prepense.

§ 9. 3d. If a man's friend be assaulted by another, or is engaged in a quarrel that comes to blows, and he, in defence of his friend, suddenly takes up a mischievous instrument, and kills his friend's adversary; this is only *manslaughter*, because of the *provocation*. And 12 Co.  
87.—Kelynge,  
136, 137.

§ 10. 4th. If A sees B, by force, ill treated, pressed, or restrained of his liberty, though B does not complain or call for aid, A may come to rescue him; and if any of those who restrain him of his liberty, are killed by A, it is but manslaughter, because of the *provocation*,—as in Hugett's case, in which pressmasters impressed B, to serve the king at sea, and he quietly submitted, and went off with them; Hugett and others pursued, and demanded a sight of the warrant; they shew a piece of paper that was no warrant; thereupon Hugett, with the others, drew their swords, and the pressmasters theirs; and a combat ensued, and Hugett's company killed one of the pretended pressmasters. Held, only manslaughter, because of the *provocation*; for when the liberty of one subject is invaded, it affects all the rest; it is a provocation to all people, as being of ill example, and pernicious consequence. The opinion of eight judges against four. See Tooley's case, Ch. 172, a. 9, s. 22. Hugett's case,  
Kelynge,  
136, 137;  
but see Fost.  
315, and  
East's C. L.  
328.

§ 11. 5th. When a man is taken in adultery with another man's wife, and the husband kill the adulterer, it is but man- 1 Hawk. 135.  
—1 Vent.  
158, Kelynge,  
137.

CH. 197. slaughter, because of the *provocation*. So if a thief come to rob me, it is lawful to kill him, and no *malice is implied*. See cases noticed by M'Nally, as to malice, 376, 380.

ART. 8. *Who are principals,—who accessaries.* In considering crimes and punishments, it is often a question, who are *principals*, and who *accessaries*, in the commission of a crime.

§ 1. "There are no accessaries in treason or trespass, but all are principals;" and "he that gives consent or aid to a trespass, is a principal trespasser; and as much punishable as he that actually commits it." And according to Holt C. J.—If a statute "make a felony *treason*, they that would be accessaries, shall be now principals, because the species of the offence is altered." The same rule holds if a statute makes a trespass a felony, some that would be principals in trespass, the offence remaining such, become accessaries when it is made a felony. In forgery, East's C. L. 973.

§ 2. In *treason* there are no accessaries before the fact, but all who advise or abet, are principals, present or absent, and those, who, after the fact, receive the traitor, are principals, except for counterfeiting the privy seal or money.

§ 3. Per Holt C. J.—If a statute inflict a penalty on the principal, or one who does so and so, it shall not be extended to one aiding and assisting, or who does differently. He that lends horses and dogs to hunt, does not aid in the hunting. If one be present, aiding and abetting in felony, he is principal, but when he is aiding and assisting, but absent at the time of the commission of the fact, he is accessory. By aiders and assisters, the law generally understands those present, aiding and assisting; hence, "if an act take away clergy from one that does such an act, and from aiders and assisters, yet it shall not take away clergy from the accessory. Accessary *before*, aids and assists to the thing; but *after* the felony, he aids, assists, and comforts after the fact; and if present, the indictment alleges he aids and assists in the thing. And where the statute calls the offence a trespass, all are principals, all are trespassers, and the punishment is laid on a trespasser. The statute here punishes the man, not because he does such an act, but because he is a trespasser. In the case of *Evans* and *Finch*, the statute punished him, who did so and so, as he who enters the house and steals; hence, *Finch* had his clergy, who stood the outside and received the goods; and *Evans* who entered, was hanged. *Rape*, which was *trespass*, is by statute made *felony*, and all aiding and assisting before or after, become felons. Hence, while a trespass, all concerned were principals; but when made a felony, some may become accessaries, as those aiding, but absent &c. Forgery once a

1 Hal. P. C.  
613.—12 Co.  
18.—Mod.  
Cas. 130, 139.  
—Crown. C.  
Comp. 135.  
—1 Chit.  
C. L. 261,  
264.

1 Hal. P. C.  
233.—Burn.  
J. Accessary,  
1.

Farr's  
Mod. Cas.  
130, 139,  
Queen v.  
Whistler.—2  
Inst. 182.—  
Hal. P. C.  
217.—Foster,  
121.—4 Com.  
D. 469.

misdeameanour. A. D. 1792, held, those privy to the uttering of a forged note, by previous concert with the utterer, but were not present at the fact of uttering, cannot be indicted as principals, but only as accessaries before. East's C. L. 974, 975.

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Art. 8.

In felonies there are two sorts of principals, to wit, principals in the first degree, that do the fact, be it murder or other felony; and principals in the second degree, that are present, aiding and abetting the felony; also two sorts of accessaries in felony: 1. Accessaries before the fact, which are not present, but yet counselling, commanding, or abetting the felony: 2. Accessaries after the fact, such as knowing a felony to be done by such a man, do yet receive and maintain him, unless it be a wife receiving her husband; but the husband cannot receive his wife.

Foster, 347,  
349.—  
M'Nally, 360.  
—1 Hal P.C.  
233.—2 Inst.  
182.—3 Inst.  
138.—4  
Burr. 2076.

§ 4. Many statutes in our criminal code describe principals, and also accessaries, and designate the punishment of each in clear and express terms.

When the common law cannot punish the principal, as in piracy, it cannot punish the accessory; and there can be no accessory until the principal is convicted, and, therefore, if "the principal be pardoned, or has his clergy, the accessory cannot be arraigned;" "for the maxim of law is, *ubi non est principalis, non potest esse accessorius*." "Then before it appears that there is a principal, one cannot be charged as accessory; but none can be called principal before he is proved and adjudged by the law, and that ought to be by judgment upon verdict or confession, or by outlawry; for it is not sufficient, that in *rei varitate* there was a principal, unless it so appears by judgment of the law;" "but if the principal, after attainder, is pardoned, or has his clergy allowed, there the accessory shall be arraigned," because it then appears judicially there was a principal.

13 Co. 63.—4  
Co. 43.

§ 5. And the principle now is, that the accessory shall not be tried, so long as the principal remains liable to be tried hereafter.

4 Bl. Com.  
318.—2 Hal.  
P. C. 292—  
Foster, 370.

§ 6. Presence to make one principal, need not always be an actual standing by, within sight or hearing of the fact. There may be a constructive presence; as where one commits a robbery &c. and another keeps watch at some convenient distance: so if A prepare the poison, and B gives it to C, ignorantly, and it kills him, A is the principal, though absent at the giving of it: so he that lays a trap whereby, in his absence, another is killed: so letting out a wild beast, or inciting a madman to kill one, the one who lets out the beast, or so incites, is constructively present, and the principal; for there is no other principal.

1 Hal. P. C.  
233, 234, &c.  
615.—4 Bl.  
Com. 34, 35,  
36, 37.—  
Foster, 349.—  
9 Co. 67, 119.  
—4 Co. 42,  
45.—11 Co.  
5.—5 Inst.  
138.

§ 7. There are no accessaries before the fact, in man-

1 Hal. P. C.  
615.

CH. 197. slaughter, and in cases of crimes suddenly committed, but  
 Art. 8. may be in *petit treason*. No accessaries in *petit larceny*, or  
 minute thefts, or in other crimes under the degree of larceny ;  
 but all concerned, if guilty in these small offences, are principals, as in trespasses &c., because the law does not regard different shades of guilt in petty misdemeanours. An accessory follows the nature of his principal, and, therefore, cannot be guilty of a higher offence than the principal is guilty of. If A kill B, the master, and C, the servant, advise it, C is accessory to A's murder ; but had C, the servant, been present, aiding and assisting, A had been guilty of murder, and C, the servant, of *petit treason*, while this crime existed in law.

1 Hal. P. C.  
 616.—4 Bl.  
 Com. 36, 37.

§ 8. How to make one accessory before the fact. The crime committed must be substantially the same as the one advised ; as if A, the father of a bastard child, advise B, its mother, to kill it, when born, and she does substantially in the manner advised, he is accessory to its murder : so if A advise B to beat C, and B beats him so that he dies, A is accessory to B's murder ; for A is accessory to all the consequences that follow on the unlawful beating he advised. So wherever the felony advised be the same in substance with that committed, and only varies in some circumstantial matters, the adviser is accessory ; as if A advise B to poison Titius, and B stabs him, or shoots him, and he dies, A is accessory to the murder ; for the substance of the thing commanded, was the murder of Titius. But if A commands B to burn C's house, and B, in doing it, robs him, A is not accessory to the robbery ; for that is a distinct act from the burning advised.

2 Hawk. P.  
 C. 316.—4  
 Bl. Com. 37,  
 40.

§ 9. *As to accessaries after the fact* If A do any thing to help the felon to escape punishment, he is aiding and assisting generally ; but it is no offence to relieve a felon in gaol with clothes and necessaries. The assistance must be after the felony committed and completed. The nearest relations, except the wife, are not allowed to assist the felon. Though it is a general rule, that accessaries shall suffer the same punishment as the principals, yet by statute, accessaries *after* the fact, in many cases, are less punished than principals ; and by the English law, are entitled to the benefit of clergy in all cases. Though formerly no accessory could be tried until after the principal was convicted &c. as above, or at least, at the same time, yet now this rule is much altered in England, and in this country. By 1 Anne, c. 9, if the principal be once convicted, and before attainder, (that is, before he receives judgment of death or outlawry,) he is delivered by pardon, the benefit of clergy, or otherwise ; or if the principal stands mute, or challenges peremptorily above the legal number of jurors, so as never to be convicted at all ; in any of these cases, in which

4 Bl. Com.  
 318, 319.

no subsequent trial of the principal can be had, the accessory may be proceeded against, as if the principal felon had been attainted; for then there is no danger of a future contradiction, (that is, the accessory found guilty and the principal acquitted); "and upon the trial of the accessory, as well after as before the conviction of the principal, it seems to be the better opinion, and founded in the true spirit of justice, that the accessory is at liberty (if he can) to controvert the guilt of the supposed principal, and to prove him innocent of the charge, as well in point of fact as in point of law;" and though there be a record of the principal's conviction. Sundry cases, Foster's C. L. 365, 368.

CH. 197.  
Art. 9.

Forst. 365 —  
Mac Nally,  
319, 320.—9  
Co. 118 —  
Forst. 366,  
Rex v. Smith.  
1 Leach's  
Ca. 323.

ART. 9. § 1. This act provides, "that every person, who shall, either upon land or sea, knowingly and wittingly, aid and assist, procure, command, counsel, or advise any person or persons to do or commit any murder or robbery, or other piracy aforesaid upon the seas, which shall affect the life of such person, and such person or persons shall thereupon do or commit any such piracy or robbery, then all\* and every such person, so as aforesaid aiding, assisting, procuring, commanding, counselling, or advising the same, either upon land or the sea, shall be" adjudged to be accessory to such piracies, *before* the fact, and suffer death &c.

Act of Cong.  
Apr. 30, 1790,  
sec. 10, 11.

§ 2. Section 11 provides, "that *after* any murder, felony, or robbery, or other piracy whatsoever, aforesaid, is, or shall be committed by any pirate or robber, every person, who, knowing that such pirate or robber has done or committed any such piracy or robbery, shall, on the land or at sea, receive, entertain or conceal any such pirate or robber, or receive or take into his custody any ship, vessel, goods, or chattels, which have been by such pirate or robber piratically and feloniously taken, shall be" adjudged &c. to be accessory after the fact, to such piracy or robbery; and on conviction shall be imprisoned, not exceeding three years, and fined, not exceeding \$500.

§ 3. Crimes and punishments, as they respect accessaries and principals, are still to be considered mainly on the principles of the common law; but few Federal or State statutes have been passed on the subject: none in the Colony or Province of Massachusetts.

§ 4. By this act against accessaries to crimes and felonious assaults, it was provided, that if any "person shall aid, assist, abet, counsel, hire, command, or procure any person to commit the crime of murder, or rape, sodomy, arson, robbery, or burglary," he should be deemed accessory before the fact, to the principal offender, and suffer his punishment. Section 2, if any one shall "knowingly receive, harbour, conceal, main-

Mass. act,  
March 15,  
1785.—  
Maine act;  
ch. 7.

CH. 197.  
Art. 10.



tain, assist, or relieve any person or persons who have committed any of the crimes before named," shall be deemed accessory after the fact; and be punished with the gallows &c., by fine, imprisonment, in the pillory, by confinement to hard labour, &c. Punishments generally varied in the revision of the criminal laws of this State, in the years 1805 and 1806, and in that revision very much blended with the principal crimes, and, therefore, will in future chapters be considered in connexion with those crimes; but these statutes only declare how accessaries and principals, in regard to each sort of crime, shall be punished, preserving the above description of accessaries.

Mass. act,  
March 16,  
1805, sect. 10.  
— Maine act,  
Ch. 7.

§ 5. Receiving stolen goods, at common law, did not make the receiver accessory, but was a mere misdemeanour, as he received the *goods* only, and not the *felon*; but by this statute it is enacted, "that if any person shall, knowingly, harbour, conceal, or maintain any principal felon, or accessory before the fact, in any robbery or larceny, or shall receive, or shall aid in concealing any money, goods, or other articles stolen, knowing the same to have been so stolen, every such offender," on conviction &c., shall be deemed an *accessary after the fact*, to the same robbery or larceny, and shall be punished by solitary imprisonment, not exceeding six months, and confinement afterwards to hard labour, not exceeding three years, or by fine, not exceeding \$500, and by imprisonment in the common gaol, not exceeding three years, or either of them.

Sect. 11.

§ 6. This section provides, "that any person charged with the receipt or concealment of money, goods, or other articles stolen, in manner as aforesaid, knowing the same to have been stolen, may be prosecuted therefor, as for a *misdemeanour*," though the principal shall not have been prosecuted or convicted, and punished as an *accessary after the fact*; but after prosecuted for a *misdemeanour*, cannot be prosecuted as accessory after the fact; construction, 5 D. & E. 83, Rex v. Baxter.

§ 7. How accessaries are punished by our statutes, in murder, burglary, rape, robbery, arson, malicious burning, and larceny. See those heads, also above.

Sect. 13.

§ 8. By this section, a receiver of stolen goods, convicted for the first offence, or as *accessary after the fact*, in any simple larceny, and not adjudged to be a common receiver of stolen goods, shall make satisfaction to the party injured, to the full amount of the money or articles stolen, and not restored; may be exempt from the penalty of hard labour.

ART. 10. *Proceedings as to principals and accessaries.*

1 Hal. P. C.  
613; see art.  
8 and 9.

§ 1. If the legislature make an offence felony, and do not name accessaries, yet those who council or command it, are,

in fact, *accessaries before the fact*, and those *after*, who knowingly receive the offender, and must be proceeded against as *accessaries* accordingly; for where a statute enacts a felony, and is silent as to them, they exist at common law; except where the legislature expressly comprehends *accessaries before the fact*, and is wholly silent as to *accessaries after*, to wit, receivers, comforters, &c. there are no *accessaries after the fact*.

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Art. 10.

§ 2. If the principal and accessory appear together, and the principal plead *not guilty*, the accessory shall be put to plead also; and if he plead *not guilty* also, both may be tried by one inquest; but the principal must first be convicted, and the jury is to be charged, that if they find the principal not guilty, they shall find the accessory not guilty; but if the principal plead in bar or abatement, or a former acquittal, &c. the accessory is not held to answer until the principal's plea is determined. If A be indicted as principal, and B as accessory, before or after the fact, and both be acquitted, yet B may be indicted as *principal*; and the former acquittal, as accessory, is no bar, as one may be guilty as principal, and not as accessory; but if A be indicted as *principal*, and acquitted, he cannot be indicted as *accessary before the fact*; if he be so indicted, he may plead the former acquittal in bar, as it is in substance the same offence. So are the authorities.

Jacob's Dict.  
title Accessary

1 Hal. P. C.  
624, 625,  
626.

§ 3. If one be indicted as *accessary before the fact*, and the evidence proves he was *present*, aiding and abetting, he cannot be convicted as accessory, or of the charge alleged, for the evidence does not support it.

Rex v. Gordon, 2  
Leach's C.  
L. 581.

§ 4. If a man was accessory before or after the fact, in another county than that in which the principal felony was committed, he could not be punished at common law; but by this statute, the accessory is indictable in the county where he is accessory, and may be there tried, as if the felony were there committed.

1 Hal. P. C.  
623.  
2 & 3 E. VI.  
c. 24.

§ 5. The general principle is, if B, the principal, commit the felony under the influence of A's advice, or if the event happening to be, in the common course of things, a probable consequence of that felony committed by B, A is accessory, and is to be indicted, and proceeded against as an accessory before the fact; but if B, the principal, follow the suggestions of his own heart, and wilfully and knowingly commit a felony of *another kind*, or upon *another subject*, A is not accessory; as if A command B to kill C, and B kills another person, A is not accessory to this killing; but if A command B to kill C, whom B does not know, A describing him, and B, by mistake, kills D, A is accessory. So if A command B to burn C's house, and he does it, and the fire extends to D's house, A is accessory to burning D's house, as an ordinary consequence of the act he commanded.

Foster, 370,  
372.—1 Hal  
P. C. 217.

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Art. 10.

Foster, 348,  
349, 354.—1  
Hale's P. C.

437.—  
M'Nally, 360,  
362.—4 Burr.  
2075.—Keil.  
77, 79.

3 of P. W.  
349, Rex v.  
Burridge.

§ 6. Principals in the second degree; that is, those present, aiding and abetting, were anciently prosecuted *as accessories*; and an alteration was made to a prosecution of them as *principals in the second degree*, in the time of E. III., that aiders and abettors *present*, might be indicted and brought to their trial, while the fact was recent, though the perpetrators, or principals in the first degree, were not then amenable; not enough the special verdict find the deft. present; Mac Nally, 363; must find also he acts, or is ready to act, to be principal.

§ 7. Indictment for being accessory after the fact, in receiving a felon, it must be charged that the deft. knew that he was convicted; and this is not aided by the finding of the verdict, especially if it be a finding, not of notice, but evidence only of notice.

Foster, 361.

§ 8. If a man be indicted as accessory to two, and is found accessory to one, judgment may be against him.

Foster, 366,  
367.

§ 9. If the principal be erroneously attainted, and then the accessory is tried, convicted, and attainted; and then the principal's attainder is reversed for error, this reverseth the attainder of the accessory, and he shall have a reasonable time to procure such reversal. So if the principal be outlawed, and reverse the outlawry, this reverses the attainder of the accessory. In a special verdict, jury finds *facts*, not evidence.

Mac Nally,  
362.—1 Hal.  
P. C. 624.

§ 10. If A, B, and C, be indicted as *principals*, and D is indicted as *accessory* to them all, D shall not be arraigned till all the principals be attaint or outlawed; for if A and B be tried and acquitted, or attainted, yet D may be accessory to C, and not to A or B. But if A, B, and C, be indicted as *principals*, and D indicted as accessory to A only, then if A be attaint, though B and C be not, yet D shall be arraigned. But the court may arraign the *accessory* in the first case; for if found accessory, he shall have judgment, but if acquitted of being accessory to A, yet this acquittal does not discharge him as accessory to B and C; and hence, when they come in and plead, and are attaint, D may be arraigned *de novo*, as accessory to B and C. So it is in the discretion of the court to arraign him, or not, before B and C are attaint; though it is the better course not to arraign him till B and C appear, or are outlawed.

Mass. S. J.  
Court, June  
1791, Essex,  
Common-  
wealth v.  
Wheeler.

§ 11. Wheeler was indicted as accessory to a former house-breaking, and also for house-breaking. Held, the crime of the principal and of the accessory, are different; and that being convicted as *accessory* to a former felony, cannot be considered as the first offence, so as now to convict and punish him for the second offence of house-breaking; this being his first offence of house-breaking, where he was principal. If the principal and accessory be joined in one indictment, and tried together, the accessory may enter into a full defence of the

principal; and his conviction is only *prima facie* evidence against the accessory, but not conclusive. Fos. C. L. 365; *Art.* 10. M'Nally, 318, 319.

§ 12. Having thus far, in this chapter, considered crimes and punishments generally, I shall now proceed, in a series of chapters, to consider them more in detail. The *crime as described*, and the *punishment as inflicted*, in each case, by the laws of the land. I shall proceed in the usual manner, beginning with crimes against religion and morality; proceed to crimes against the public, and then to those against the lives, persons, habitations, and estates of individuals; offences against the public, by misbehaviour in office, the grounds of impeachments, and removals from office.

The concise form in the subjoined note, contains the technical language proper in the indictment of accessories, before and after the fact, and of the principals in the first and second degree.\*

\* Indictment of the principals, first and second degrees, and accessories before and after the fact, in a case of murder.

*Accessaries.—Indictment; before the fact.*

*Present*, that whereas R. C., late of —, adn. and J. O., late of —, adn., not having God before their eyes, but seduced by the instigation of the devil, on —, at —, with force and arms, feloniously, and of their aforethought malice, in and upon J. J., then and there being, in the peace of God and of the Commonwealth, made an assault and affray; and the aforesaid R. C., a certain gun called a pistol, of the value of five shillings, then and there charged with gunpowder and a leaden bullet, which gun the said R. C. in his right hand then and there had and held, in and upon the said J. J., then and there feloniously, voluntarily, and of malice aforethought, did shoot off and discharge, and the said R. C., with the leaden bullet aforesaid, from the gun aforesaid, then and there shot and discharged, and the aforesaid J. J. in and upon the left part of his breast, near the left pap of him the said J. J., then and there feloniously struck, giving to the said J. J., then and there, with the leaden bullet aforesaid, out of the gun aforesaid, then and there shot off and discharged, in and upon the left part of the breast of him, the said J. J., one mortal wound, of the breadth of half an inch, and depth of five inches, of which mortal wound the aforesaid J. J. at —, instantly died.

And that J. O. feloniously, and of his aforethought malice, then and there was *present*, aiding, assisting, comforting, and maintaining the aforesaid R. C. to the felony and murder aforesaid, in form aforesaid, to be done and committed; and so the aforesaid R. C. and J. O. the aforesaid J. J. at —, in manner and form aforesaid, feloniously, voluntarily, and of the malice aforethought, killed and murdered, against the peace and dignity of the Commonwealth. And R. C. of —, adn., not having God before his eyes, but being seduced by the instigation of the devil, *before* the felony and murder aforesaid, by the aforesaid R. C. and J. O. in manner and form aforesaid, done and committed; that is to say, at —, on —, to the felony and murder aforesaid, in manner and form aforesaid, to be done and committed, maliciously, feloniously, voluntarily, and of his malice aforethought, did entice, move, and abet, counsel, and procure, against the peace and dignity of the Commonwealth.

*Accessaries.—Indictment; after the fact.*

*Present*, that whereas R. C., late of —, adn. and J. O., late of —, adn., not having God before their eyes, but seduced by the instigation of the devil, on —, at —, with force and arms, feloniously, and of their aforethought

CH. 196. ART. 11. *Extracts from the New Penal Code of France,*  
 Art. 11. *and remarks on them.*

§ 1. This valuable code of French criminal law, heretofore law in Louisiana, and, in some degree, so still, comprises, in a small compass, a clear and concise definition of nearly every crime, offence, and contravention of law, and annexes the proper punishment to each, in a manner plain and intelligible, and the whole code is classed and arranged in a systematic order, and contained in 484 articles, and in about 70 octavo pages.

§ 2. The infractions of the law, the police may punish, are called *contraventions*. Those subjecting the party to correctional punishment, are called *offences*, or *misdemeanors*; and those for which the law inflicts corporal or ignominious punishment, are called *crimes*. The punishments are, 1. Death, (by beheading): 2. Hard labour for life, [performed out-doors]: 3. Transportation: 4. Hard labour for a limited time, [also performed out-doors]: 5. Imprisonment, and branding, and total confiscation of estate, are often added.

malice, in and upon J. J., then and there being, in the peace of God and of the Commonwealth, made an assault and affray; and the aforesaid R. C., a certain gun called a pistol, of the value of five shillings, then and there charged with gunpowder and a leaden bullet, which gun the said R. C. in his right hand then and there had and held, in and upon the said J. J., then and there feloniously, voluntarily, and of malice aforethought, did shoot off and discharge, and the said R. C., with the leaden bullet aforesaid, from the gun aforesaid, then and there shot and discharged, and the aforesaid J. J. in and upon the left part of his breast, near the left pap of him, the said J. J., then and there feloniously struck, giving to the said J. J., then and there, with the leaden bullet aforesaid, out of the gun aforesaid, then and there shot off and discharged, in and upon the left part of the breast of him, the said J. J., one mortal wound, of the breadth of half an inch, and depth of five inches, of which mortal wound the aforesaid J. J. at —, instantly died.

And that J. O. feloniously, and of his aforethought malice, then and there was *present*, aiding, assisting, abetting, comforting, and maintaining the aforesaid R. C. to the felony and murder aforesaid, in form aforesaid, to be done and committed; and so the aforesaid R. C. and J. O. the aforesaid J. J. at —, in manner and form aforesaid, feloniously, voluntarily, and of their malice aforethought, killed, and murdered, against the peace and the dignity of the Commonwealth. And A. O., late of —, adn., well knowing the said offender to have done and committed the said felony, in manner and form aforesaid, to wit, at —, on —, with force and arms, him, the said —, did then and there feloniously and of malice aforethought, receive, aid, and comfort, against the peace and dignity of the said Commonwealth.

*Note.*—For the facts, a special verdict must state, to make one principal in the second degree, see the cases collected, M'Nally, 360 to 371, and when the special verdict finds the facts, the court must decide what crime they constitute; most English indictments are referred to, 6 Wentw. index.

Several persons present at the death of a man, may be charged with different degrees of homicide in the same indictment; as one with murder, and another with manslaughter; for if there be no malice in the party striking, but malice in an abettor, it will be murder in the latter, though only manslaughter in the former; East's C. L. 350; but if a bill be framed for murder against two, and the grand jury find it a true bill against one, and manslaughter as to the other, there must be a new bill for manslaughter against the last. Id.

The ignominious punishments are, 1. Pillory : 2. Banishment : 3. Deprivation of the rights of citizenship. The correctional, 1. Confinement for a limited time to a house of correction, [that is, hard labour within doors] : 2. Deprivation, for a limited time, of certain rights of citizenship, or of civil or family rights : 3. Fines. The penalties the police may inflict for contraventions of the law are imprisonment and fine. These are the punishments this code inflicts ; but they do not extend to *military* contraventions, offences, or crimes. As in our law ; they do not exempt the offender from damages to the party injured. Art. 1 to 12.

CH. 197.  
ART. 11.

§ 3. By art. 2 this code, it is provided, that "every attempt to commit a crime, manifested by overt acts, and followed by commencement of execution, if it have been suspended, or have failed of its effect, only from accidental circumstances, or such as were independent of the will of the perpetrator, is considered as the crime itself." By this general rule of law, as to all crimes ; if one intend murder, for instance, and commences the work of killing a person, but does not kill him, because prevented doing it, against his will, he is guilty of murder, and so of any other crime. I think our law is not precisely like this ; as by our law, for instance, if a man intend to commit a rape, and seize the woman to that intent, but is effectually resisted by her, he is not punishable for a rape, but for an assault, intending to commit a rape. This appears to me to be the most material variation, in principle, in this code, from our laws. And art. 3 this code, enacts, that "*attempts* to commit offences, are not considered as actual offences, except in cases in which it has been expressly so determined by law." Herein this code agrees with our law. Art. 4,—“no contravention, offence, or crime, shall entail punishments which were not provided by law for the same, before the commission thereof.” This is our common law. In the case of *parricide*, the offender's right hand is cut off, and then he is immediately beheaded. It is a good law that thus distinguishes this from other murders. By art. 14, “the bodies of those executed, are delivered to their families, if claimed, to be buried privately, and without pomp :” is not this better than our practice ? Art. 16,—Women, condemned to hard labour, are punished in the workhouses, and separate from the men. This, too, merits attention. *Deportation* is for the culprit's life, out of France, and to a place selected by government, and if he return, he is condemned to hard labour for life. By art. 18, “condemnation to hard labour for life, and to transportation, shall work civil death.” On these points our statutes are deficient. Art. 19,—“condemnation to hard labour for a limited time, shall not be for

CH. 197. less than five years, nor for more than twenty." Thus, by  
 Art. 11. establishing a general principle, scores of tautologies, in the  
 statute book, become wholly unnecessary. Art. 20,—Every  
 one sentenced to hard labour for life, is branded on the right  
 shoulder, and manner described; and in no other case, but  
 where branding is specially added. By art. 21, persons of  
 either sex, confined to labour in the workhouses, may have  
 such parts of their earnings, as the government may assign to  
 them: cannot be less than five years, nor more than ten. It  
 is obvious, this power in the government may be used to ad-  
 vantage, as the culprit will naturally conclude, his proportion  
 will be according to his conduct. Art. 22,—Every one sen-  
 tenced to hard labour or confinement, is first put in the pillory  
 an hour, in a manner to excite in him or her, a sense of  
 shame. Is not this a good addition?

§ 4. Art. 28,—One condemned to hard labour, to banish-  
 ment, confinement, or pillory, cannot be a juror, arbitrator, or  
 witness, "but merely to give such information as may lead  
 to other proof:" This article establishes the true principle,  
 as to evidence and information: cannot be a guardian, but  
 by his family's consent, and then but for his children; nor  
 can he wear a sword, or serve in the army. This may be a  
 wiser provision in the French nation, than in many others.

By art. 29, persons condemned to hard labour for a limited  
 time, or to confinement, are, for the time, *civilly dead*, and  
 trustees appointed to their estates. Our statutes are silent  
 on this subject. Art. 32,—Banishment, not less than five,  
 nor more than ten years. If he return, he is transported, 33.  
 Art. 34,—*Civil degradation* adds to the above disqualifica-  
 tions, that of not holding any public office.

As to these disqualifications of culprits confined &c., our  
 law may be constructively the same; but, to find it, we have  
 often to examine hundreds of pages, and sometimes in books,  
 not one lawyer in a thousand has. By art. 36, provision is  
 made for posting, in the towns most proper, a printed account,  
 to expose the culprit and his crime fully to public view. This  
 is also judiciously added. Art. 40,—Imprisonment is in the  
 house of correction, and at work, and branches of labour are  
 there established. The term of this correctional punishment  
 is not less than six days, nor more than five years, for the  
 first offence. This general rule, too, saves many repetitions  
 in statutes—A day, twenty-four hours; a month, thirty days.  
 The profits of his labour are well applied. Art. 42, 43,—  
 The *correctional* tribunal may deny the offender, where by  
 law directed expressly, 1. A right to vote or serve as an  
 elector: 2. To be elected to office: 3. To be a jurymen,  
 or to serve in any office: 4. To wear arms: 5. To vote in

family councils : 6. To be guardian, except as above, or to be trustee : 7. To be arbitrator, or witness to writings ; or in court, as above. What is our law on these points ? Have we any law, statute or common, on several of them ?

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Art. 11.

§ 5. In this code, art. 44 &c. &c., there is a provision almost peculiar to it, which places the culprit under the higher police of the state, by which the government, at its own motion, or at the request of the party injured, may require security of the offender for his good behaviour, *after* he has undergone his punishment ; and if he fail to give it, he is at its disposal. This is a further guard, perhaps a very wise one, in this code ; and by art. 47, “ persons condemned to hard labour for a limited time, or to confinement,” after liberated, “ and during the remainder of their life, remain under the particular inspection of the *higher police*.” By this wise provision, if a culprit do not appear to be reformed by his punishment, he may be held to his good behaviour. Art. 48,—So persons banished for a time, equal to the term of their banishment. Art. 49,—Persons condemned for crimes or offences, affecting the internal or external safety of the state, are put under the same inspection : no others are under it, except those specially designated by law. Though this is a power an arbitrary government may abuse, it can be exercised upon none but those previously condemned by law, to some ignominious punishment. In art. 55, is a good provision, that all, condemned in concert for the same crime or offence, shall be held jointly and severally answerable for the fines, restitution, damages, and costs. Generally, the punishment of the second crime is increased one grade, and the accessory is punished as the principal. Art. 56 to 63,—Minors, according to circumstances defined. Sixteen is the age of discretion. Punishments varied as to persons above seventy ; art. 64 to 72. In art. 73 &c., is an excellent provision to prevent keepers of inns, and lodging-houses, secretly harbouring offenders. The residue of this code, art. 75 to 484, accurately, but concisely, defines the crime, offence, and contravention of law, and annexes the punishment in almost every possible case, beginning with treason, several of which articles, most deserving our imitation, or opposition, will be noticed under their proper heads.

§ 6. It may be observed here, that in the repeated revisions of the Greek, Roman, and French laws, in the course of three thousand years, and more ; aided by so many centuries of experience, almost every possible crime, offence, (or misdemeanor,) and contravention of law, seem to have come into view ; and, by the numerous successive revisions, to have been expressly provided for, and again and again defined, and its

CH. 197. punishment apportioned, until the definition has become nearly perfect, and the punishment generally apportioned in the wisest manner. One reason is, the ancient Greeks and Romans, from time to time, appointed their best lawyers, in sufficient numbers, to revise and digest their laws, and gave them ample time for the purpose, and this, usually, without any regard to party politics, or sectarian religion. The French, at least of late years, have adopted the same wise plan. The work has been practicable, because the principle of it has always been kept alive, and each successive revision has been made in time, and before the confusion in the laws, and the difficulties in revising them, have become so great, as to be insurmountable. No such plan has been adopted and executed in England, or the United States, or, it is believed, any State, in regard to the common law, three fourths of all our municipal law. This common law is now found in more than a thousand volumes, and will soon be found in more than two thousand, at the rapid rate law books increase. Probably a revision of it, like those of the Greek, Roman, and French laws, has already become impracticable; as it is hardly to be presumed, that any sufficient number of revisors would be able to agree, what this common law, (scattered in so many books, and often in cases confused, and frequently contradictory,) is, on a multitude of points.

§ 7. It is very material to observe, that in the acts of Congress, and generally of our State legislature, the prevailing punishments are pecuniary fines; and that it is very different in this French penal code; as in this, the prevailing punishments are inflicted on the body of the offender, by pillory and branding, by confinement to labour, and imprisonment.

Certain it is, these French punishments are the best calculated of the two, to prevent crimes, offences, and contraventions of law. They are clearly the most notorious, and the most dreaded; especially by those who wish to rank in society above the wretched, the low, or the mean sort of people. In most societies probably the greater number of wrongs are done by the extortions and oppressions of men in office; and by the frauds and extortions of men who assume rank and fashion. Such men, in general, but little regard paying the fines that must be suited to the condition of all, but most sensibly feel and dread ignominious confinement, or any kind of corporal punishment, publicly inflicted; but in a work of this sort the difference can only be named, and not enlarged upon.

§ 8. *Family laws in France.* These forcibly attract our attention; these laws, enacted by the national legislature, establish *family councils*, in which members in the family legally vote in family affairs; and we have seen it is a part of the

civic degradation, to be deprived of this right to vote and advise: so in many places in the Penal Code, certain near relations in the family, are not obliged by law, to give information of the crimes or offences of each other; and article 380, to subtract or embezzle the wife's property by the husband, or his by her, or by a widower, or widow, of the property of the deceased wife or husband; or by sons, daughters, or other lineal descendants, of the property of their fathers or mothers, or by fathers or mothers, or other lineal descendants, of the property of their children, or other lineal ascendants, all by blood or marriage, is only a ground of civil actions, though the same acts in other persons are thefts.—What is our law on these points in this article 380? Is it not a disgusting scene in our law, to see the father convicted of theft by the testimony of his son?

§ 9. *Minute attention in this code.* Though the Penal Code of this great nation, is comprised in less than 70 octavo pages, and is properly divided into titles, books, chapters, sections, articles, and numbers; and the proper heads in each title, book, chapter, and section entered, yet every kind of offence, and its proper punishment, seems to have been attended to, as a few parts will shew. Article 471, "persons guilty of the contraventions hereinaftermentioned, shall be fined from one to five francs inclusively, to wit, 1, those who shall neglect to clean and keep in good repair their chimneys, ovens, or other places in which fire is used."

Number 7, (same art.) "those who shall leave in the streets, roads, public squares, or in the fields, ploughshares, bars, or rails, or other engines, instruments, or arms, or weapons, which robbers, or other malefactors could make use of." [*Quare*, if the English or our laws punish these neglects at all.]

Number 11, (same art.) those who, without provocation, shall make use of insulting or abusive words to others, not provided against by article 368 to 379, inclusively," (articles against calumny and slander.) [*Quare*, if such words are punished at all, by the English or our laws.] Attentions, how minute, as to the penalties, the subjects in themselves, and also such as are rarely legislated upon by the most civilized nations. Yet may not such laws, in the course of centuries, produce important effects? And may not such in part account for the apparent vigilance and extreme external politeness in the intercourse of the French people? The absence of abusive language, and attention to *minutiæ*, sometimes frivolous.

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Art. 11.



## CHAPTER CXCVIII.

## CRIMES &amp;c. AGAINST RELIGION AND MORALITY.

ART. 1. *General principles.*

§ 1. Reason decides, and so experience has universally been, that a good system of government cannot be supported in any nation, especially a free one, without morality ; and that morality, itself, a part of natural religion, cannot be preserved pure and sound, without religion ; and that religion cannot be preserved long in its purity and vigour, without a regular system of worship ; and without laws to prevent crimes against religion, as blasphemy, profaneness, &c. ; and against morality, as against a licentious intercourse of the sexes, against intemperance, &c. But as civil rulers cannot look into the human heart, nor read the inward thoughts of men, as they cannot notice and punish acts done in *secret*, but only *overt* acts done with the knowledge of others, and so are capable of proof, the laws of society, or of the land, can have no concern in regard to a man's religious sentiments, kept concealed in his own breast, or his moral guilt, known to none but himself and his God. This secret guilt in morals and religion, will be a violation of God's laws, he will recognise and punish. It has been well observed, "that reverence for God, and conscientious regard for religion, are the main supports of honesty, and therein of society and civil government." Cicero thought, to do away piety toward the gods, was to take away a most excellent virtue,—justice. See Ch. 219, a. 2, s. 19 ; Holt on Libels, 75 to 81.

§ 2. It will be found, the laws of the United States, and of each State, are very liberal on this interesting subject, and much more so now than in the early settlements of our country. Whilst, on one hand, they avoid those wicked and profligate forgivings and atonements, so common in some countries, of moral and religious crimes ; they, on the other, pay every due respect to religious liberty, and the sacred rights of conscience. The consequence is, we have but few laws that punish crimes against religion, properly considered ; none of the United States, if perjury be excepted ; and but few State laws that punish such crimes. Even in the free and liberal country of Great Britain, there are many laws punishing men in religious matters, not in force in our country ; as laws against apostacy, and against heresy, in their various forms ; once inflicting death, at a bishop's will, for what he might

construe the one crime or the other ; as arbitrary laws against reviling the established church ; and against non-conformity to the practice of that church. Laws which disable all the papists, one quarter part of the people of England and Ireland, to purchase lands, or take them by devise or inheritance, after eighteen years old ; and to teach or keep any school &c. ; and if Protestant dissenters are in a better condition than the papists, it is only in virtue of an act of parliament, that may be repealed at any time, by the ruling sect. Whereas, in the United States, the Papist, Jew, &c. has full liberty of conscience, the free and uninterrupted exercise of his religion, and if a citizen, a full capacity to purchase, take by descent, and hold lands, at his will and pleasure, as also to vote in all our elections, and be elected into many of the best offices.

CH. 198.  
Art. 1.

4 Bl. Com.  
54, 55.

Except a few  
States.

§ 3. The statute in England, in force till lately, severely punishing a person for denying the doctrine of the *trinity*, passed, too, in the enlightened days of William and Mary, is a striking proof what may be done by a legislature, suddenly, or in the fervour of the moment, or under the influence of a sect or faction, when not restrained by some constitutional provision. Seeing the pernicious effects of religious bigotry and intolerance in other countries, displayed in the forms of legislative acts, and these followed by bloody persecutions, the wise framers of our constitutions prudently guarded against them.

§ 4. But though there is no law in the United States to punish, at the present time, these matters in the courts of law generally, yet it is not to be understood, that apostacy, heresy, &c., are viewed as giving no offence ; but generally they are the subjects of church censures, and especially in regard to church members, and often the grounds of excommunications of them. Morality, or the law of nature, is the great rule of conduct in the United States. In numerous cases a good moral character is required : religious faith, but in very few. The moral or natural law, is " the great unwritten law of mankind ;" and being made by God himself, its known authority can never be questioned.

§ 5. And some offences against religion, further, are punishable at common law, and indictable ; such as seditious words in derogation of the established religion, as tending to a breach of the peace. Haw. P. C. 2. So writing against Christianity generally ; and see *Rex v. Woolston & al.* ; and *Rex v. T. Paine*, East C. L. 5.

Fortesc. R.  
Pl. 95, 99.—  
2 Roll. Abr.  
187.—East,  
C. L. 4, 5.

§ 6. As to offences against religion and morality, the laws of Virginia and Kentucky are similar to those of Massachusetts ; all in substance derived from the old English statutes on these subjects, cited in this chapter, varying, however, the

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Art. 2.

Cro. J. 24,  
421.—See a.  
8, s. 17.—See  
Stra. 416.

punishments. But as to enforcing, by law and taxes, the support of public worship, Massachusetts is quite alone.

§ 7. Seditious words in derogation of the established religion, are indictable, as tending to the breach of the peace. Holt on Libels, 75. And indictable at Common law. Hawk. ch. 5. In the *Queen v. Clendon*, the court had no doubt but that a libel concerning the trinity was an offence at common law. 10 Anne; Holt on Libels, 77.

ART. 2. *Blasphemy.*

1 Vent. 293.  
—4 Bl. Com.  
59.—Strm.  
834.—3 Kel.  
607.

§ 1. Blasphemy against God, by denying his being or providence; or by *contumeliously* reproaching Christ, profane scoffing at the Holy Scriptures, or exposing it to contempt, or ridicule; these are offences punishable at common law, by fine or imprisonment, or infamous corporal punishment. W. Bl. 398; Vent. 293.

Mass. C. & P.  
Laws, 58, 61,  
A. D. 1646.—  
1 Hawk. 10,  
13.—Act of  
Virginia of  
1786.—1  
Mod. 142.—  
Stra. 416,  
788.—1 East,  
P. C. 3.—2  
Chit. C. L.  
14.

§ 2. Early in the Colony government of Massachusetts, the Colony legislature passed a law, enacting, that "if any person within this jurisdiction, whether Christian or Pagan, shall wittingly and willingly presume to blaspheme the holy name of God, Father, Son, or Holy Ghost, with direct, express, presumptuous, or high-handed blasphemy, either by wilful or obstinate denying the true God, or his creation, or government of the world, or shall curse God in like manner, or reproach the holy religion of God, as if it were but a political device, to keep ignorant men in awe; or shall utter any other kind of blasphemy of the like nature and degree, they shall be put to death;" citing Levit. xxiv. 15, 16. And as an excuse for enacting this law against our pagan Indians, it was recited in the preamble of it, that "the eternal power and Godhead was known by the light of nature, and the creation of the world," &c. It was not explained what our ancestors meant in this law, by *Godhead*, as something known by the light of nature to pagan Indians in America. This law was grounded on the idea that God himself created and governs the world.

1 Mass. C. &  
P. Laws, 302,  
A. D. 1697.

§ 3. This law was revised and re-enacted nearly in the same words, with an enumeration of the books of the Old and New Testaments; but the punishment was altered to imprisonment, not exceeding six months, by pillory, whipping, by boring through the tongue with a red-hot iron, or setting on the gallows &c., provided no more than two of said punishments should be inflicted for one and the same fact.

Mass. act,  
July 3, 1782.  
Maine act,  
ch. 8.

§ 4. This law was again revised, and it was enacted, "that if any person shall wilfully blaspheme the holy name of God, by denying, cursing, or contumeliously reproaching God, his creation, government, or final judgment of the world, or by cursing or reproaching Jesus Christ, or the Holy Ghost; or by

cursing or contumeliously reproaching the holy word of God ; **CH. 198.**  
 that is, the Canonical Scriptures, contained in the books of the **Art. 4.**  
 Old and New Testaments, or by exposing them, or any part of  
 them, to contempt and ridicule ; which books are as follow :  
 Genesis &c., enumerating the whole ; every person so of-  
 fending, shall be punished by imprisonment, not exceeding  
 twelve months, pillory, whipping, or gallows, &c., or binding  
 to the good behaviour, at the discretion of the Supreme Ju- **See 2 State**  
 dicial Court. **Trials, 273.**

§ 5. Prosecutions on these laws have been very rare. One **July, 1795,**  
 Avery was indicted in the Supreme Judicial Court for this **Lincoln**  
 crime of blasphemy, on the last mentioned statute, and sen- **County,**  
 tenced to be set on the gallows one hour, and to be whipped **Avery's case.**  
 twenty stripes. No other prosecution on this statute has  
 been found. See *Rex v. Woolston & al.* Ch. 219, a. 2,  
 s. 19.

§ 6. Blasphemy against God, and contumelious reproaches **8 Johns. R.**  
 and profane ridicule of Christ, or the Holy Scriptures, are **290, The**  
 offences punishable at the common law, whether uttered by **People v.**  
 words, or writing. Held also, that wantonly, wickedly, and **Ruggles.**  
 maliciously, uttering the following words—" *Jesus Christ was*  
*a bastard, and his mother must be a whore,*" was a public of-  
 fence, and punishable by the common law of the State.  
 New York.

**ART. 3. Idolatry.** This crime also was noticed by the **Mass. C. & P.**  
 Colony legislature, which enacted, "that if any man, after **Laws, 58.**  
 legal conviction, shall have, or worship any other god, but the  
 Lord God, he shall be put to death." This law does not  
 appear to have been revised ; nor does it appear there ever  
 was any prosecution on it ; nor that there was such a law in  
 England. How did this law affect those who avowedly wor-  
 shipped Christ, as some Trinitarians have ever done ? And  
 when, too, zealously contending he is a Being distinct from  
 the Lord God.

**ART. 4. Heresy.** Though this crime is now unknown in **Mass. C. & P.**  
 our penal code, except as above, this has not always been the **Laws, 120,**  
 case. For in 1646, the Colony legislature enacted, "that **121, 126.**  
 if any Christian within this jurisdiction, shall go about to sub-  
 vert and destroy the Christian faith and religion, by preaching  
 and maintaining any *damnable heresies*, as denying the immor-  
 tality of the soul, or resurrection of the body, or any sin to  
 be repented of in the regenerate, or any evil done by the  
 outward man, to be accounted sin, or denying that Christ  
 gave himself a ransom for our sins ; or shall affirm that we  
 are not justified by his death and righteousness, but by the  
 perfection of our own works ; or shall deny the morality of  
 the fourth commandment ; or shall openly condemn or oppose

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Art. 6.



the baptizing of infants ; or shall purposely depart the congregation at the administration of that ordinance ; or shall deny the order of the magistracy, or their lawful authority to make war, or to punish the outward breaches of the first table ; or shall endeavour to seduce others to any of the errors or heresies above mentioned ; every such person, continuing obstinate therein, after due means of conviction, shall be sentenced to banishment." A second offence was punished with death or banishment ; but afterwards the punishment was reduced to a pecuniary fine. This law became obsolete, as such laws generally will, very soon, among a people any way liberal. In all ages, all religion has been heresy a man believes not ; and has ever varied with the variations of religious opinions, among a bigoted people. By this statute, a *heretic* was defined to be a "teacher of erroneous opinions, contrary to the faith and blessed determination of the holy church." This church was the Roman Catholic. Hence all religion, contrary to her decisions, was heresy. In the time of Queen Elizabeth, all the statutes against heresy were repealed, which left it as it was at common law ; that is, as to the infliction of common censures in the Ecclesiastical Courts. And in case of burning the heretic, in the Provincial Synod only ; and the writ to burn the heretic, was grantable only at the king's discretion. And by 29 Ch. II. c. 9, this writ was abolished, and heresy again subjected only to ecclesiastical correction, *pro statute animæ*. Thus, in the time of Henry IV., all religion in England was heresy, but the Roman Catholic ; and in turn, all that became heresy in the same country.

2 H. IV. c.  
15.—Hale's  
P. C. 383,  
385 —4 Bl.  
Com. 45, 48,  
49.—Indict-  
ment for  
heresy.—  
Ras. Ent. 263.

Mass. C. & P.  
Laws, 192,  
A. D. 1647.

ART. 5. *Jesuitism*. This was another crime against religion in the Colony of Massachusetts, in which the Colony legislature imputed the great wars then in Europe, to the Jesuits ; men, it said, brought up, and devoted to the religion and court of Rome. And it was enacted, "that no *Jesuit*, or spiritual or ecclesiastical person," ordained by the Pope or See of Rome, at any time, shall come into this Colony ; and that if any one was justly suspected of being a *Jesuit*, he should be brought before the magistrates, and if he could not clear himself of such suspicion, he was to be committed to prison, or bound to the next court of assistants, to be tried and proceeded with, by banishment, or otherwise, as the court might order. And if such Jesuit was banished, and returned, his punishment was death. But this law extended not to Jesuit's shipwrecked and cast on our coasts, departing hence as soon as they could ; nor to those attending public messengers ; or merchants, masters of ships, &c.

ART. 6. *Profane cursing and swearing*. To prevent this crime against religion, numerous laws have been passed in

the Colony, Province, and Commonwealth of Massachusetts, also in other Colonies, Provinces, and States; and these laws have been generally continued in force to the present time. There long has been like laws in England,—the prior ones on the subject were repealed by 19 Geo. II. c. 21, and a new one enacted; providing, that every labourer, sailor, and soldier, &c., forfeit 1*s.* for every profane oath or curse, and every gentleman &c. 5*s.* The last act on this subject in Massachusetts, was passed June, 1798, and inflicts a penalty of not above two, nor less than one dollar, for any person arrived at discretion, for profanely cursing or swearing. For a second offence, double; and for a third offence, treble; and for every profane curse, or oath, at the same time, and before the same witnesses, after the first, not above fifty, nor less than twenty-five cents, one moiety of said forfeitures to the use of the poor of the town, and the other moiety to the use of the complainant; and if the offender do not pay the fine &c., he may be committed to the common gaol, or house of correction; and he is allowed an appeal from the justice of the peace to the Sessions, now Common Pleas. The form of the conviction is prescribed, and the prosecution must be in twenty days after the offence committed. This act is annually read in meetinghouses and town-meetings. Articles of war; every profane oath or execration, in the army, is punished by a pecuniary fine. So in the navy, by another act of Congress.

CH. 198.  
Art. 7.

Mass. act,  
June 29,  
1798.—  
Maine act,  
ch. 8.—Ken-  
tucky Laws,  
371, fine, 5*s.*  
—Act Dec.  
19, 1801.

Act of Con-  
gress, April  
10, 1806.

ART. 7. *Witchcraft, conjuration, enchantment, and sorcery.*

Though we have no statutes now against such supposed crimes, we once had. In Massachusetts' Colony, in 1647, a statute was passed, by which it was enacted, that "if any man or woman be a witch, that is, hath, or consulteth with a familiar spirit, they shall be put to death;" and cited Exod. xxii. 18; Levit. xx. 27; Deut. xviii. 10, 11. And October, 1692, the Province legislature provided, "that if any person or persons shall use, or practice any invocation or conjuration of any evil and wicked spirit, or shall consult, or covenant with, entertain, employ, feed, or reward, any evil and wicked spirit, to, or for any intent or purpose, or take up any dead man, woman, or child, out of his, her, or their grave, or any other place, where the dead body resteth, or the shin-bone, or any other part of any dead person, to be employed or used in any manner of witchcraft, sorcery, charm, or enchantment, or shall use, practise, or exercise any witchcraft, enchantment, charm, or sorcery, whereby any person shall be killed, destroyed, wasted, consumed, pined, or lamed, in his or her body, or any part thereof, that then, every such offender or offenders, their aiders, abettors, and counsellors, being of any

Mass. C. & P.  
Laws, 58;  
and 735, 736.  
—1 Jan. I.  
c. 12, cited  
in Toulmin's  
Kentucky  
Laws.—  
4 Bl. Com.  
61.—1  
Hawk. 8.

CH. 198. of the said offences duly and legally convicted and attainted,  
 Art. 7. shall suffer the pains of death as a felon or felons." Another  
 part of this law punished with imprisonment and the pillory,  
 persons undertaking to discover stolen goods &c. by sorcery &c.  
 to work mischief to others, though nothing should be done.

When we read these laws, and especially those against witchcraft, cited *verbatim*, that they may not be misunderstood, we see the most unshaken faith in witchcraft, leagues with evil spirits, &c. in the legislators. They seem to have believed in these things as much as they did in their existence, and at first view, our pity is excited towards them, when we see such astonishing credulity in a grave legislative assembly,—an assembly legislating upon the lives of a whole people; for in those days of folly and fanaticism, no one, existing under such a law, was secure an hour, but his life was continually exposed on account of the delusions, credulity, and the infatuations of accusers and witnesses. So was experience,—execution after execution took place for witchcraft, and leagues with evil spirits; and nothing but the most wretched excess of this folly cured it. Yet, on further reflection, we are led almost to excuse their credulity and weakness, as an innate trait in the human character; for a wretched delusion seems to have been, in some shape or form, almost coextensive with the human race; and it was some honour to our ancestors, that they were cured of this sort of mania before the people of Europe were, in general; and there is still a statute in Ireland in force against witches, and unrepealed; and our statutes on these subjects were nearly copied from 1 Jam. I., c. 12. The civil law punished with death, not only the sorcerers themselves, but also those who consulted them; Cod. L. 9, c. 18; and even in the latter part of the eighteenth century, Judge Blackstone himself, whatever he thought, dare not deny the existence of witchcraft; for he says, "to deny the possibility, nay the actual existence of witchcraft, and sorcery, is at once flatly to contradict the revealed word of God, in various passages, both of the Old and New Testaments; and the thing itself is a truth to which every nation in the world hath, in its turn, borne testimony, by either examples, seemingly well attested, or prohibitory laws, which at least suppose the possibility of a commerce with evil spirits;" and the law of God is express, observes this judge, that "thou shalt not suffer a witch to live;" and that the English laws, "both before and since the conquest, have been equally penal; ranking this crime in the same class with heresy, and condemning both to the flames." And according to the same author, the English statutes remained in force against witches till a late period, "to the terror of all ancient females in the kingdom; and many poor wretches were sacrificed thereby, to the prejudice

4 Bl. Com.  
 Chr. notes, 5.  
 —4 Bl. Com.  
 60, 429.

9 Geo. II.

of their neighbours, and their own illusions; not a few having, by some means or other, confessed the fact at the gallows; but all executions for this dubious crime, are now at an end; our legislature having at length followed the wise example of Louis XIV. in France, who thought proper, by an edict, to restrain the tribunals of justice from receiving informations of witchcraft. Hence, for about one hundred years, in France, about eighty in England, no prosecution for witchcraft has been allowed; and, I may add, there has been none in fact in Massachusetts for one hundred and twenty years; for the excessive mania here had its usual effect to break and cure the disease soon. But for the violent excess of the Salem witchcraft, we might have had, as in many other places, witchcraft a lingering disease far into the eighteenth century. Lord Coke and Hale both believed in witchcraft, conjuration, and sorcery; and Lord Hale joined in giving a judgment, that two women should be hung for witchcraft.

CH. 198.  
Art. 8.

3 Inst. 44, Sir James Melville's Memoirs.

ART. 8. *Lord's day acts.*

§ 1. Many acts for the due observation of the Lord's day, have been passed by the Colony, Provincial, and State legislatures, and generally in force to the present time. They have been generally of the same tenor.

§ 2. The last general law passed on this subject was in 1792, a mere revision of the former statutes on the same subject. This act, generally on moderate pecuniary penalties, forbids all persons to keep open their shop, warehouse, or workhouse, or to do any manner of labour, business, or work, (works of necessity and charity excepted) on land or water, to be present at any concert of music, dancing, or any public diversion, show, or entertainment, or to use any sport, game, play, or recreation, on the Lord's day, or any part of it, which is defined to be from midnight preceding, to sun-setting the same day.

Mass. act, March 8, 1792.—  
Maine act, Ch. 9.

Toulmin's Kentucky Laws, 372, fine 10s.—27 H. VI. c. 6.

§ 3. Section 3 provides, "that no traveller, drover, wagoner, teamster, or any of their servants, shall travel on the Lord's day, or any part thereof, (except from necessity or charity) upon the penalty of a sum not exceeding 20s., nor less than 10s.; but by an after act, the penalties were nearly doubled, half to the town, and half to the complainant.

3 Jam. I. c. 21.—1 Hawk. 11, 13.—1 E. VI. c. 1.—1 Eliz. c. 2, s. 9.

Mass. act, March 11, 1797.  
Maine act, Ch. 9.

§ 4. Section 3 (act 1792) provides that no vintner, retailer of strong liquors, innholder, or other person, keeping a house of public entertainment, "shall suffer any town inhabitants or others, not travellers, strangers, or lodgers in their houses, to abide and remain in their houses, yards, orchards, or fields, drinking or spending their time, either idly or at play, or doing any secular business, on this day, on penalty of 10s. &c. for each person so entertained. And each person so abiding, drinking, &c. forfeits not above 10s., nor less than 5s. The penalties

CH. 198. are increased on a conviction of a second offence, and license  
 Art. 8. forfeited on a third conviction.

§ 5. Section 5 forbids recreation on the evenings preceding and succeeding the Lord's day; and no persons, on those evenings, to be entertained, or to abide in taverns &c. but travellers, strangers, and lodgers.

Section 6 enjoins attendance on public worship on this day, at least once in three months, if able, (provided there be a place of worship, at which he or she can conscientiously and conveniently attend).

§ 6. Section 7 forbids indecent behaviour in meetings. Section 8 forbids the interruption of public worship at any other time. Section 9 forbids the service of any civil process on this day, between midnight and midnight. Section 10 directs the tithingman's duty, his oath, his power; but he has no power to stop or detain a person, but only to prosecute him; and by section 11, his testimony is sufficient.

§ 7. *Cases in construction of these laws.* John Appleton was indicted, and fined, for that he, at said Ipswich, on —, and on divers days and times, between that day and the day of —, did work and labour with himself and team on the Lord's day, not for necessity or charity, against the peace, and the statutes in that case made and provided, and to the evil example of others to offend in like cases.

2 Mass. R.  
163, Com-  
monwealth v.  
Symonds.

§ 8. Held, a charge for behaving rudely in a meetinghouse, and for interrupting public worship, cannot be joined in one count in an indictment. Def. was convicted in the Sessions, and appealed; judgment arrested; for here are two distinct offences in one count, described in two distinct sections in the act, and for which distinct and different fines were provided.

6 Mass. R. 76,  
Common-  
wealth v.  
Knox.

§ 9. Held, it is not an indictable offence for the carrier of the mail, who is under contract with the postmaster-general, to carry the same each day of the week, to travel with the mail on the Lord's day; for by the constitution of the United States, Congress is authorised to establish post offices and post roads, and by act of Congress, May 8, 1794, this authority is executed. By the first section, the post roads are established; and by the second, the postmaster-general is empowered to contract for carrying the mail on any road, on which &c.; and pursuant to this act, the postmaster-general had contracted with Paine, and he was under obligation to execute his contract by himself or his servants. "By the Federal constitution, laws made in pursuance thereof, are declared to be the supreme laws of the land, and to be binding on the judges in every State in the Union; and if a statute of any State should contain provisions prohibitory to the execution of powers authorized by a constitutional act of Congress, such provisions will not have

the force of law; therefore, if the second section of our statute would, upon a necessary construction of it, create the offence charged in the indictment, that section would not be legally binding on us, as judges of this court." But travelling, when of necessity, is not prohibited by that section; by necessity, there cannot be understood physical necessity; for a case in which a man is physically obliged to travel, can hardly be imagined; but a moral fitness or propriety of travelling, under the circumstances of any particular case, may be deemed necessity within this section; and, *a fortiori*, when the travelling is necessary to execute a lawful contract, it cannot be considered as unnecessary travelling against the prohibition of the statute. And the postmaster-general, though not obliged to do it, has contracted to carry the mail on the Lord's day; and there are many times, as in cases of war or insurrection, when this authority should be exercised; "and at all times it is within his discretion whether to exercise it or not." This was an important decision, and removed many doubts that had existed; but the court further said, their opinion did not protect *travellers* in the stagecoach; or the carrier of the mail driving about any town to discharge or to receive passengers; and much less in blowing his horn, to the disturbance of serious people, either at public worship or in their houses.

CH. 198.

Art. 8.



§ 10. In this case the court held, that offences against the above statutes are not originally cognisable in this court: decided on a plea to the jurisdiction of the court, put in by the defendant in person, on half defence, saying, "the court here ought not to take further cognisance, or sustain the said indictment, because within the jurisdiction of a justice &c. or Common Pleas &c.," and not within the jurisdiction of the Supreme Judicial Court &c., and an extensive view was taken of the jurisdiction of our several courts.

8 Mass. R. 87,  
Common-  
wealth v.  
Johnson.

§ 11. This act provides that any person who breaks the second section of said act of 1792, as to travelling &c. shall be liable to a penalty not less than four, nor more than six dollars sixty-six cents, to be recovered with costs, before any justice &c. in the county where the offence is committed, half to the county, and half to the complainant; or before the Circuit Court of Common Pleas of the same county, by presentment &c.; then the whole penalty is to the county; and all prosecutions must be in six months after the offence committed, unless the offender resides without the Commonwealth.

Mass. act,  
Feb. 16, 1816.  
—Maine act,  
Ch. 9.

§ 12. Selling meat on Sunday was no offence at common law; but East C. L. 5, for keeping public and open shop, and exposing meat to sale on the Lord's day, held, an indictment lay at common law; 9 Co. 66.

2 Stra. 702.  
3 Burr. 1595.

CH. 198  
Art. 8.

13 Mass. R.  
324, Pearce v.  
Atwood.

§ 13. *Action of trespass against a constable for arresting the plt. on the Lord's day.* Assault, battery, &c. in common form. The plt. was an inhabitant of the county of Hampden; plea, *not guilty*. Deft. filed a brief statement of facts, pursuant to the statute of 1792, c. 41, stating, one Jonathan Dwight, a tithingman, duly chosen &c. in the town of Belchertown, in the county of Hampshire, and believing the plt. violated the laws made for the due observation of the Lord's day, by riding at Belchertown on Sunday, June 26, 1814, complained, on oath, to Eldad Parsons, Esq. a justice of the peace in and for said county of Hampshire, against the plt. Justice issued his warrant on that day (Sunday) against the plt., directed to the sheriff &c. of Hampshire, or any constable of Belchertown, to apprehend the plt. &c. (in common form); and the deft., so being constable of said town of Belchertown &c., did arrest the plt. (Sunday) and detained him until the next morning, then brought him before said Parsons, to answer &c. It appeared at the trial in this court, that the justice and constable both knew the plt. was an inhabitant of Monson, in said county of Hampden. Said complaint and warrant were not admitted, because affording no legal defence: 1. Because said justice was interested, being an inhabitant of Belchertown, entitled to half of the fine: 2. Because he had no jurisdiction of the offence, the plt. being an inhabitant of *another* county (statute, 1791, c. 58): 3. Because he had no legal authority to issue his warrant on Sunday, there being no breach of the peace. These reasons were adjudged good by the whole court: 4. Held, also, an arrest on Sunday, in pursuant of such warrant, is illegal: 5. The statute of 21 Ja. I., c. 21, requiring actions against officers, for any matter touching their offices, to be brought in the county where the act is done, is not in force in this State now, if it ever was. As to the justice's interest, however minute, it took away his jurisdiction; there being no necessity for the exercise of it. Judgment for the plt.; damages \$25. The second point depended on the construction of our statutes; the others mainly on common law principles, and cases, all of which will be found in the several parts of this work, and many more on these points.

14 Mass. R.  
330, Commonwealth v.  
Caldwell.

§ 14. *Where not necessary to allege the tithingman was sworn into office.* The deft. was indicted on the act of 1791, c. 58, s. 10, in the Common Pleas, for refusing to give an answer to a tithingman on that day. He appealed; retracted his former plea, and entered *nolo contendere*, and then moved in arrest of judgment. One reason, not alleged the tithingman had ever taken the oath prescribed by the act: 2. Nor that he had any wand or badge of his office, when he demanded of the deft. his answer: 3. Nor that it was known

to the deft. he was a tithingman, or the deft. had any reason to believe he was one. Indictment only alleged, he was duly chosen. The indictment was adjudged good ; for alleging Stone was a tithingman, involved the allegation he was sworn. Wad not required by said act, though it was by a former law. 3. Not necessary to aver, the deft. knew Stone to be a tithingman, he being a public officer. The *scienter* is not a constituent part of the offence. " If the deft. did not know him to be an officer, this would be a good defence by the common law, and need not be negatived in the indictment." Cases cited for the deft. 1 Chitty on Pleadings, 216 ; 2 Burr. 1127 ; Com. D. Pleader, C. 50, as to the oath. For the Commonwealth, as to it ; 2 Burr. 832, *Rex v. Royall*. As to the *scienter*, for the deft. ; 1 Chitty, 376 ; 5 Burr. 2667 ; 6 East, 473 ; Com. D. case for deceit, F. 3 ; Justices, M. 12 ; 1 East C. L. Homicide, s. 81, 82, 83.

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Art. 8.

§ 15. Indictments at common law, against a shopkeeper, for keeping shop openly on the Lord's day : so for disturbing divine service. Cro. C. C. 529, 531 ; 4 Wentw. 362, 363.

§ 16. This act forbids ministers to be arrested for any civil cause, whilst performing religious worship, on Sundays or other days ; also forbids them to be maliciously or contemptuously disquieted, or their congregations, assembled for such worship, and the ill usage of any person therein. Derived from Virginia, and in substance the common law. Punishment, fines and imprisonment.

Kentucky  
acts, Dec. 19,  
1801, s. 36.

§ 17. The writings against Christianity, which have been condemned as libels in England and the United States, seem to have been of the abusive, passionate, ridiculing, buffooning, jesting, or blasphemous sort ; as in several cases in this chapter, and Ch. 219, a. 2, s. 19 ; Ch. 207, and other places. Hence, it said the law does not prohibit reasonable controversy, even upon fundamental subjects, conducted with moderation, argument, and in proper language. On the whole, the language of the decided cases on this subject is extremely indefinite. The judges in England have often decided, that Christianity is a part of the common law ; and in one case they said, " we interpose only where the very root of Christianity itself is struck at ;" that to write against Christianity in general, is an offence at common law ; but desired it to be noticed, " that they laid stress on the word *general*," " and did not intend to include disputes between learned men upon particular controverted points." See Annett's case, convicted for publishing Paine's Age of Reason. 2 Burn. Ecc. Law, 781, cited Holt on Libels, 79, 80. Holt observes, on the law and all the cases, " that this libellous blasphemy is understood as affecting only the foundations of Christianity, the truth of the

In the King  
v. Woolston,  
the court  
mentioned  
*Rex v. Hall*,  
as buffooning  
the trinity ;  
Holt on Li-  
bels, 78.

Fitzgib. 66.—  
In *Rex v.*  
Woolston,  
cited Holt on  
Libels, 77,  
&c.

CH. 198. Holy Scriptures, and the acknowledged sacraments of the church.”

Art. 9.

ART. 9. *Adultery, incest, and lewdness, &c.*

4 Bl. Com.  
64, 65.

§ 1. Adultery, notorious lewdness, incest, and fornication, are all offences against religion and morality. They are all forbidden in the Scriptures, as well as by the laws of morality and the laws of the land. They are all indictable offences. In the year 1650, the ruling powers in England, made not only incest, and wilful adultery, capital crimes, but also the repeated acts of keeping a brothel, or committing fornication, were, on a second conviction, made felony without benefit of clergy; but at the restoration, these laws were not renewed. Hence, “these offences have been ever since left to the feeble coercion of the spiritual court, according to the rules of the canon law, a law which has treated the offence of incontinence, nay, even adultery itself, with a great degree of tenderness and lenity; owing, perhaps, to the celibacy of its first compilers.” “The temporal courts, therefore, take no notice of the crime of adultery, otherwise than as a private injury in England.”

§ 2. But the laws of Massachusetts, and of our States generally, are different; they never have left these offences to the church.

Mass. C. & P.  
Laws, 59, A.  
D. 1646.—  
Page, 277.

*Adultery.* By the Colony law of Massachusetts, it was enacted, that “if any person committed adultery with a married or espoused wife, the adulterer and adulteress shall surely be put to death.” By a law passed in 1694, adultery was punished by sitting on the gallows, and whipping thence to the common gaol, not exceeding forty stripes each; and every person so offending, forever after, to wear a capital *A*, of two inches long &c., cut out in cloth of a contrary colour to their clothes, and sewed upon their upper garments, on the outside of their arm, or on their back, in open view. And a public whipping was the punishment for being without the letter. Adultery was not defined in this act.

Mass. act,  
Feb. 17, 1785.  
—Maine act,  
ch. 10.—  
Toulmin’s  
Ken. Laws,  
372, fine £5.

§ 3. In 1785, the Commonwealth of Massachusetts passed a law enacting, “that if any man or woman shall commit adultery,” shall be set on the gallows with a rope &c. one hour, be publicly whipped, not exceeding thirty-nine stripes; be imprisoned or fined, and bound to the good behaviour; “all or any of these punishments, according to the aggravation of the offence.” Hence, by this law, the punishment may be thus infamous, or thus merely binding to the good behaviour, with a fine at the court’s discretion.

10 Mass. R.  
153, Com-  
monwealth  
v. Calef.

§ 4. The deft. was indicted, being a married man, for that he did with force and arms, unlawfully and lasciviously associate and cohabit with one E. K. a single woman, against the peace

&c. Held, the indictment was not supported by *one act* of CH. 198. criminal intercourse; for by *cohabiting*, means living together, Art. 9. not a single unlawful interview. The design of the statute was "to prevent evil and indecent examples, tending to corrupt the public morals." "Perhaps an indictment for adultery" might have been maintained by the evidence stated. As to several matters respecting adultery, see *Commonwealth v. Very*, Ch. 90, a. 11, s. 22; and Ch. 99. If the deft. is not married, he cannot be convicted of adultery, though the woman be married, with whom he was guilty of *crim. con.*

§ 5. 2d. *Lewdness*. What is open and gross lewdness; see *Catlin's case*, Ch. 91, a. 10; see *Rex v. Wilkes*, 4 Burr. 2527, 2530; and *Curl's case*. 2 Dallas, 124, 125.—Holt on Libes, 84, 85.

This act provides, "that if any man and woman, either or both of whom being then married, shall lewdly and lasciviously associate and cohabit together; or if any man or woman, married or unmarried, shall be guilty of open, gross lewdness, and lascivious behaviour," shall be punished by sitting in the pillory, whipping, fine, imprisonment, and binding to the good behaviour, all or any of these &c. 1 Hawk. 10, cited as the law in Kentucky. Mass. act, Feb. 17, 1785, sec. 6. —Maine act, ch. 10.—4 Bl. Com. 64.

§ 6 3d. *Incest*. This act was passed to prevent incestuous marriages. This act forbids any man or woman to marry within the degrees named in the act; and declares all marriages within those degrees incestuous and void; and the issue thereof illegitimate, and "subject to all the disabilities of such issue." See an explanation of these degrees, *Baron and Feme*, Ch. 19; and especially Ch. 46, a. 2, as to marriages. An indictment at common law lies for any offence against public morals, decency, and good manners. Mass. act, March, 16, 1786.—Maine act, ch. 10.—Holt on Libels, 85.—2 Stra. 790.

7. 4th. *Fornication*. This crime, like others against good morals and religion, was early a subject of legislation among our ancestors. Therefore, in 1642, the Colony legislature passed an act, and enacted, "that if any man commit fornication with any single woman, they shall be punished, either by enjoining marriage, or fine, or corporal punishment, or all, or any of these;" and by an act passed 1692, this offence was made punishable by fine, or whipping, not exceeding ten stripes each. Mass. C. & P. Laws, 115, 213.—Ken. act, Dec. 19, 1801, s. 39, fine 5s.

§ 8. By this act, "if any man commit fornication with a single woman," he may be fined to the use of the country, not above £5, nor less than 30s.; and if he neglect, twenty-four hours, to pay his fine, he may be whipped, not exceeding ten stripes; and the woman so offending may be fined, not exceeding £3, nor less than 6s.; and if unable to pay, may be imprisoned or sent to the house of correction, not above ten days, nor less than twenty-four hours, for the first offence; Mass. act, March, 15, 1786. Maine act, ch. 10.

CH. 198. and for any such after offence the punishment is doubled &c.

Art. 9. This act further provides, she may confess her fault to a justice, and pay 6s. for the first offence, and 12s. for any after offence; and if he accept such fine, he gives a certificate, and she is not liable to be prosecuted. The indictment for this offence merely charges that the deft. with force and arms committed the crime of fornication, against the peace of &c., and the statute in such case made &c.

§ 9. Though all well-governed nations have enacted laws to restrain the crimes enumerated in these articles, viewing them as crimes extremely injurious to morals; and have annexed punishments to them; yet these punishments have been very different in different countries, and frequently in the same country and state. In our Colony, it will be observed, if a single man knew an espoused wife, both were surely put to death; and they were, in this law, called the *adulterer* and *adulteress*. Yet he, being a *single man*, was not, in fact, guilty of adultery;—nor was she, in fact, not being a married woman; as adultery, truly considered, can be committed only by a *married person*. Though some books seem to consider the crime, *adultery* in both, though only one party be married. In the law of 1694, adultery was very *infamously* punished, but not with death; and in the law of the Commonwealth, of 1785, it may be punished only with a small fine. So the law has varied as to fornication, in many nations. Once in Massachusetts, the punishment of it was very infamous; yet the parties might wholly avoid it by intermarrying, often the event of their choice, and no punishment; then made infamous, without this choice; then subjected only to a small fine. So in other States, the punishments of these offences have materially varied, according to times and circumstances, manners and modes of thinking. It will be observed, on an attentive perusal of these laws, as of our law book, that a distinct, clear line, is by no means drawn, between adultery and fornication. Yet it is material one should be, because in one act, of 1785, it is enacted, “if any man or woman shall commit *adultery*,” and in the other act,—“if any man commit *fornication* with a single woman,” to be punished &c. In neither case is adultery or fornication at all defined. To seduce one’s wife is an indictable offence. The charge of adultery is, that A. B. of ———, (deft.) at ———, on ———, did commit the crime of adultery with C. D. of ——— &c., by having carnal knowledge of her body, he, the said A. B. being then and there a married man, and having a lawful wife alive. Some forms lay the offence, *with force and arms*.

Comb. 377.

§ ART. 10. *Polygamy.*

§ 1. This is another crime against religion and morality in every country in which a man, by law, can have but one wife. This offence deserves attention. The nature of it we see in this act of Massachusetts, which enacts, "that if any person within this Commonwealth, *being married*, or who hereafter shall marry, shall marry any person, the former husband or wife being alive, or who shall continue to live so married," shall be punished with the gallows, public whipping, not exceeding thirty-nine stripes, imprisonment, fine, and binding to the good behaviour, all, or any of these punishments &c.; and the trial may be in the county in which the offender is apprehended. But this act extends not "to any person whose husband or wife shall be continually remaining *beyond sea*, by the space of seven years together; the one of them, in either case, not knowing the other to be living within that time." Nor does this act "extend to the wife of any married man, who shall wilfully absent himself from his said wife, by the space of seven years together, without making suitable provision for her support and maintenance in the mean time, if it shall be in his power so to do." Nor does this act extend to the *innocent party, divorced*; nor to persons married within the age of consent.

§ 2. With regard to the evidence of such second marriage, see the Commonwealth *v.* Moffat, Ch. 46, a. 3, s. 16; and one within the age of consent is not punishable, Ch. 46, a. 2; Ch. 96, a. 1, s. 4.

This statute, passed in 1694, defined the offence necessarily as above, but made it felony, and death; and the offender was triable in the county where apprehended. But there was the like saving as to husbands and wives absent seven years, persons divorced, and those within age. And in the act passed in 1698, there was a provision, "that if any married person, man or woman," went to sea in a ship or vessel, and not heard of in three years after putting to sea, or only heard of in a dangerous situation, probably to be lost, the married party alive, might marry again, by license from the governor and council. This last clause has never been revised.

§ 3. It does not appear that *polygamy* has ever prevailed in Europe. According to Tacitus, *De Mor. Germ.* 18, the ancient Germans had but one wife. Both in ancient and modern Sweden, polygamy has been punished capitally: so in England, by 1 Jam. I. c. 11;—and the *second* marriage being void, the *second* husband or wife is a witness for or against the other party in this second marriage. The English statute allows the party in England to marry again, if the other has been absent seven years, "whether the party in England hath

CH. 198.  
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Mass. act,  
Feb. 17,  
1785.—  
Maine act,  
ch. 10.—  
Kentucky  
laws, 361,  
punishment  
in the peni-  
tentiary,  
had been  
capital.—  
See act Dec.  
19, 1801,  
s. 5.

Mass. C. & P.  
Laws, 273,  
321.


CH. 198.  
Art. 10.

4 Bl. Com.  
163.—East's  
C. L. 464,  
472.

notice of the other's being alive or not." And the English law is less strict than ours on this subject of marrying again, in some respects, as where one party is absent seven years from the other *in the kingdom*, not heard of within that time, the other may marry. But the English law has no such proviso as the second in ours, as to a husband wilfully absenting himself seven years, and not providing for her. The English law does not extend to a divorce, *a mensa et thoro*, though that law is against polygamy. Our statute against it has a *proviso*, by which the act extends not to a case of divorce; but does not express whether a divorce, *a vinculo* only, or *a mensa et thoro* also; if both, it is like the English statute in this respect; but the better opinion is, our act excepts only a divorce *a vinculo*.

§ 4. When parties marry within the age of consent, a question arises, how far the minor is at liberty, by law, to marry again, and so how far the second marriage is not *polygamy*. The English law, on this subject, is like ours, and Blackstone's opinion is, the first marriage is voidable, by "disagreement of either party, which this second marriage very clearly amounts to;" but that if at the age of consent, the parties agree to the marriage, "which completes the contract, and is indeed the real marriage, and afterwards one of them should marry again, I should apprehend that such second marriage, would be within the reason and penalties of the act."

§ 5. What is a husband's wilfully absenting himself from his wife seven years together, and not providing for her support, when he is able so to do, is a material question on our statute, that has never, probably, been decided, if ever made, in a court of law, though hundreds of cases of the kind, or questionable if not so, have existed, in fact, since 1785. No second marriage is recollected ever to have been had on this clause in the act, though, probably, on a fair construction, many might have been had. It is generally true, when laws are enacted, in such general uncertain terms, they have more effect than the legislature intended; for most persons, fearing the uncertainty of the law, and afraid to venture on a doubtful case, omit to do a thing, if there be any, even a small degree of risk, in doing it. And in this case it is best it should be so; for it is better that ten do not marry, when strictly they may, under this provision, than that one should contract a second marriage, where, by law, she cannot do it. Where the first marriage is void, it is not polygamy to contract a second. As where A married B in Holland, and then C in that country, in B's life-time; B died, then A living; C married D in England; held, not polygamy to marry D, because A's marriage with C was void. But if B had been

living, it had been polygamy, (or bigamy,) to marry D. East's CH. 198.  
 C. L. 466. So a second marriage is polygamy during a first Art. 11.  
 marriage, though that be voidable, for consanguinity &c. Id.   
 See several other constructions, p. 466 &c.

ART. 11. *Bawdy-houses, brothels, &c.*

§ 1. These, which also respect the intercourse of the sexes, in a criminal sense, are likewise against good morals, and, as the places of licentious conduct, against religion; and are punishable at common law. The indictment charges that the deft. at —, on —, and at divers days and times, before and afterwards, held, and kept, and often made use of, and still holds, and keeps in his house there, a *common bawdy-house, entertainment for lechery and fornication*, and permits men, and other suspected persons, and not of good behaviour and fame, carnally to lie with whores, to the great detriment of the people of the said Commonwealth, there near dwelling, to the evil example of others, offenders in such cases, and against the peace &c.

So strict and vigilant is the common law on this subject, that if one lease his house to be used as a place of *prostitution*, he cannot recover his rent.

§ 2. We have seen, the wife may be indicted, with her husband, for keeping a bawdy-house, or brothel. 4 Bl. Com. 29. So one may be indicted for frequenting a brothel, 64. So these houses of ill fame may also be indicted as public nuisances, and suppressed, 167, 168. Their invariable tendency is to corrupt morals.

§ 3. In this case it was decided, an indictment lies for keeping a bawdy-house; and if a lodger, having a *single room*, will accommodate lewd people to practise prostitution in it, she may be indicted for keeping a brothel, as well as if she have the whole house. But a bare solicitation of chastity is not indictable. Salk. 382,  
Queen v.  
Pierson.

§ 4. This was an indictment against husband and wife, for keeping a common bawdy-house. On motion to quash the indictment, on the ground the wife could not be guilty of this offence with her husband; held, she might be guilty, and that the crime was joint and several; and he and she may commit a trespass, murder, and treason; and the wife may have a share in the government of a disorderly house, as well as the husband; and keeping a bawdy-house does not necessarily import property in the wife, but (10 Mod.) “may signify that share of government which the wife has in a family, as well as the husband.” These houses of prostitution are a pernicious evil in every society where they exist. They are not only nuisances, and corrupt morals in a high degree, but they are also become destructive of health, as the seats of Salk. 382  
Queen v.,  
Williams.—  
10 Mod 63,  
same case.

Ch. 198. pestilence and disease, especially since the foul disease has  
 Art. 12. become so prevalent. But a house in which to deliver women  
 of illegitimate children, is not indictable. 3 Burr. 1645.

ART. 12. § 1. *Drunkenness* or *intoxication*, has been an evil in every age and climate, but less where the means of intoxication have been small, and greater where the means have been increased. At the present day it is certain there is no greater enemy to religion and morality than drunkenness and intemperance. The drunkard is immoral of course, and almost invariably grossly irreligious. He wastes his estate; he destroys his constitution; and in time he makes himself a mere brute. Since the increase of ardent spirits, in most countries we are connected with, and especially in our own, the means of drunkenness have increased tenfold. To prevent this vice has ever been a serious and important object in the Christian world, and especially in our part of it. Hence, laws to punish and to prevent this evil have ever been kept in force.

§ 2. So far has drunkenness been from an extenuation of guilt, when crimes have been committed by men intoxicated, it has, in all ages, been viewed as aggravating the offence, not as excusing it. Coke says, a drunkard has no privilege, "but what hurt or ill soever he doth, his drunkenness doth aggravate it." In Greece, the law of Pittacus enacted, "that he who committed a crime when drunk, should receive a double punishment;" and the law of England will not suffer any man thus to excuse one crime by another; and so is our law.

§ 3. Before our ancestors left England, drunkenness was punished by a forfeiture or fine of 5s. (as much as four or five dollars now), or the sitting six hours in the stocks. After they arrived in this country they enacted a similar law; and for a second offence, bound to his good behaviour, with sureties, and for want of them, he was committed to the common gaol. But the offence was to be prosecuted in six months after committed. By another act of 1693, whipping, not exceeding ten stripes, might be added in certain cases. In 1734, the fine for this offence was raised to 10s. These laws punished the first offence.

As to proceedings against drunkards and putting them under guardianship; see Guardians &c., Ch. 35.

§ 4. By this act (as to licensed houses) it was enacted, that the selectmen of each town shall cause to be posted up in the houses and shops of all taverners, innholders, and retailers, within the town, a list of the names of all persons reputed *common drunkards*, or *common tiplers*, or *common gamesters*, misspending their time and estates in such houses; and this act, inflicts a penalty of 30s on the keeper of any such house, who afterwards shall suffer any person on any such list, to drink,

4 Bl. Com.  
 Com. 25, 64.  
 —1 Inst. 247.  
 —Puff. Law  
 of Nations,  
 b. 8, c. 43.—  
 Plow. 19.—  
 4 Co. 125.—  
 Salk. 231.

4 Jam. I. c. 5.  
 —Mass. C. &  
 P. Laws, 238,  
 259, 493.—  
 Kentucky  
 fine 5s. act,  
 Dec. 19, 1801,  
 s. 34.

Muss. act,  
 Feb. 28,  
 1787.—  
 Maine act,  
 ch. 133.

uple, or game there, or shall sell spiritous liquors to any such person ; and the selectmen may in writing prohibit licensed persons selling (one year at a time) spirituous liquors to excessive drinkers, idlers, and misspenders of time, on penalty of 20s. CH. 198.  
Art. 12.

In some material points the Colony and Province laws differed from those of the Commonwealth, as to drunkenness and intemperance. The 4th Jam. I. c. 5, the ground work of the Colony and Province laws, against intemperance, recited that drunkenness was an odious offence, and the cause of many other enormous offences, and punished every person who was drunk, even the first time. Our old laws adopted this principle, except they required two witnesses to convict of the offence ; and they empowered the selectmen, from time to time, to appoint one or more discreet persons to oversee, and inform of the breach of the said laws, to be reasonably recompensed for their services. . The Colony and Province laws first treated and punished drunkenness as an offence in itself: 2. They made informing of the offence an official and positive duty, so rewarded. Whereas the laws of the Commonwealth do not generally punish or even restrain any person as to the commission of this offence, except 1. Common drunkards: 2. Those, who by excessive drinking greatly injure their health, or endanger the loss of it: 3. Those, who by excessive drinking, so lessen their estates, as thereby, with their families to be exposed to want, or to be a town-charge ; for the laws respecting licensed houses and places, operate principally on the licensed persons, one may be drunk every day in the year, and these laws in no manner affect him, if he only avoids those places. Thus the old laws took in hand the intemperate man, the first time drunk ; the new law, not till generally past reformation ; the old, made it a legal duty to inform ; the new, leaves the execution to volunteer informations, always unpopular. The difference in practice was great ; the old law checked intemperance in time, before one was settled down a common drunkard, or greatly endangered his health, or was on the verge of pauperism ; not so, the new. The old law made it the business of particular persons to prosecute, if the selectmen saw fit to appoint such ; and such were more willing to perform their business, and were less obnoxious than mere volunteer informers under the new laws. The public or popular opinion will run very strong against a volunteer informer, when it will very patiently bear with the informer who only does the duty by law assigned him.

Maine acts to protect the sepulchres of the dead, ch. 15. This act punishes their violation ; and act, ch. 16, is to prevent the arresting of dead bodies &c. Massachusetts act as to sepulchres passed March 2, 1815, see Ch. 218, a. 2. s. 20.

C. & P. Laws,  
238, 398.

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Art. 1.

Mass. act,  
March 4,  
1850.—See  
Maine act,  
ch. 9.

§ 5. *Neglect to support public worship.* This act enacts, that every town, parish, body politic, or religious society recognised in the act, be constantly provided, "with a public Protestant teacher of piety, religion, and morality;" and on default three months, in any six months, being able in the judgment of the Sessions, forfeits for each offence not above \$60, nor less than \$30; after the first offence, not above \$100, nor less than \$60, to be recovered by indictment in the Sessions. To ground an indictment, the town &c. must first be so adjudged able. This, though correct, was a new decision. This law can operate only on incorporated religious societies, and only one able to support such teacher, in the opinion of the court; of course, a very large part of our religious societies are not compellable to support public worship.\*

\* The French Penal Code, as it punishes crimes and offences against public morals, articles 330 to 340, is not to be preferred to our laws on this subject. The first provision is a good one, which punishes a person who commits, in public, an outrage upon decency, with imprisonment from three to twelve months, and a fine from sixteen to two hundred francs. But this code very imperfectly guards and protects female chastity; hence, it punishes *rape* only with confinement, in common cases. So it punishes those who habitually prompt, favour, and facilitate lewdness or prostitution in persons under twenty-one years of age; not those who do so in regard to persons of age. So it punishes "adultery committed by a married woman," by imprisonment from three to twenty-four months; but she can be prosecuted only on her husband's complaint; nor then, if he be guilty of adultery with a concubine in his house, and convicted on his wife's complaint; and if so convicted, he is only fined from 100 to 2000 francs; and no proof is admitted against him who commits adultery with the wife, "except that of his being taken *flagrante delicto*, or that of letters or other writings under his hand." Not one time in a hundred can this evidence be had; perhaps not one in a thousand. On a fair view of these laws, it is plain, the French code makes but feeble efforts against adultery, fornication, and concubinage. Fornication is not punished; nor can adultery be, if neither husband or wife will prosecute the other. Morals must be in a bad state in France, if, as stated, there were among twenty-nine millions of people, only six hundred and four thousand births in a year. Yet bigamy is well punished by hard labour for a limited time.

## CHAPTER CXCIX.

### CRIMES AGAINST THE STATE.

#### ART. 1. *General principles.*

See Ch. 222,  
Impeach-  
ments.

§ 1. Crimes against the state are usually crimes against the sovereign power of the state, and may in this country be considered under two heads: 1. Crimes committed by the citi-

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Art. 2.

zens, and by residents under the protection of our laws, in violation of their allegiance, including treason, and crimes connected with or arising out of treason : 2. Crimes against public ministers, as ambassadors &c. representing the sovereign power of a nation : the first, as treason &c. are crimes against the sovereign power of our own country : the second, as violations of the plenipotentiary rights, are crimes against foreign sovereignties in the characters of their representatives. Some make a distinct head or branch of criminal law, of the crimes against the laws of nations, but this is not now necessary ; for but a few parts of the law of nations are the grounds of criminal suits or prosecutions. Breaches of national law usually come under other heads, and form branches of civil suits, already considered in other chapters, as the branches called law merchant, as national law relating to captures, ransom bills, safe conducts, and passports, aliens, &c.

§ 2. And breaches of the rights of public agents, will be the subject of a distinct article ; and so will piracy, so far as it is a violation of national law. There has been no treason in England, at common law, since the year 1350, when the 25th Ed. III. c. 2, was passed, declaring what alone should in future be adjudged treason. Hence, no common law treason could be brought to America, by our ancestors ; and decisions in in treason cases before 1350, cannot be worth attention.

In cases of treason it is a general principle, that any *overt* act of treason not laid, may be given in evidence, when it tends directly to prove one of the *overt* acts laid. East, 122, 123. But not if indirectly, as being only a collateral circumstance ; Vaughan's case. In framing the indictment it will do to state the substance of a libel, or of treasonable letters or writings, and so to prove the substance, and of what is laid. East, 124, several cases. So surplusage need not be proved, or more than one of several *overt* acts.

#### ART. 2. *Treason.*

§ 1. As treason is a breach of allegiance we must first inquire what allegiance is, and who owes it, by the laws of our country ; and how due ; and first, to the United States, and secondly, to the several individual States. Treason is a very limited offence, and so is breach of allegiance, in the United States, compared with these matters in old monarchies. In England, first and last, there have been above fifty kinds of treason, and various acts have been deemed breaches of allegiance among the seven kinds of treason embraced in the 25th Ed. III., (and these in England were a very reduced number.) We, in the United States, in fact, have adopted but two descriptions : those of levying war, and adhering to a public enemy, giving him aid and comfort.

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## Art. 3.

Mass. act, 1777.—Act of Maine, ch. 1.—As to forms, see *Cro Cir Com. &c.*—Of indictment for treasonable correspondence; 1 *Wentw.* 14, 15, 20.—6 *Wentw.* 358, 368.

4 *Bl Com* 74.

1 *Bl. Com.* 369, 370.

Hale's *P. C.* 68.—Fost. 184, 189.

1 *Hal. P. C.* 59.—7 *Co. 6.*

7 *Co. 1* to 56, case of *Calvin*.—3 *Dall.* 133.—*Hawk.* c. 17, s. 7.

ART. 3. *Allegiance.*

§ 1. The true principles of allegiance in the United States, are described in this statute, enacting, "that all persons abiding within the State, and deriving protection from the laws of the same, owe allegiance to this State, and are members thereof; and that all persons passing through, visiting, or making temporary stay in this State, being entitled to, and actually receiving, the protection of the laws, during the time of such visitation, or temporary stay, owe, during the same time, allegiance to this State." These are the facts that constitute the allegiance of persons living or being under any sovereign power, and having the protection thereof; hence, persons, in these situations, in the United States, and enjoying the protection of their laws, owe them allegiance.

And every citizen in the United States owes allegiance to his State, also to the United States; and by the tenth article of war, and the act of Congress of January 11, 1812, every officer and soldier engaging in the army, takes a prescribed, but short, oath of allegiance to the United States.

§ 2. Allegiance is expressed and implied, natural or local. "Natural allegiance is such as is due from all men born within the king's dominions, immediately upon their birth; for immediately upon their birth they are under the king's protection." "This natural allegiance cannot be forfeited, cancelled, or altered by any change of time, place, or circumstances, nor by any thing but the united concurrence of the legislature." An Englishman who removes to France or China, owes the same allegiance to the king of England as at home; and twenty years hence as well as now; "for it is a principle of universal law, that the natural born subject of one prince, cannot by any act of his own,—no, not by swearing allegiance to another, put off or discharge his natural allegiance to the former." "Local allegiance is such as is due from an alien or stranger born, for so long a time as he continues within the king's dominions and protection." "Allegiance is a debt due from the subject, on an implied contract with the prince, that so long as one affords protection, so long will the other demean himself faithfully; as, therefore, the prince is always under a constant tie to protect his natural born subjects at all times, and in all countries, for this reason their allegiance due to him is equally universal and permanent."

§ 3. In this case the various kinds of allegiance are stated; as natural allegiance, that of birth: 2. Acquired or by denization: 3. Local allegiance: and 4. Legal allegiance. *Nemo potest exuere patriam*: East, C. L. 50, 51: not even if he go abroad when an infant. Several cases decided.

In the English cases, and in monarchies and empires, *allegiance* is said to be due to the king or sovereign prince; but the principle is the same in a republic, and we only substitute the name of State, or Commonwealth, or United States, to that of king &c. In the one case, *allegiance*, or *legiance*, is the lawful obedience which a subject is bound to render to his sovereign; in the other, to his State &c.; and this legiance is "*reciprocum ligamen, quia sicut subditus tenetur ad obedientiam, et rex tenetur ad protectionem.*" This maxim, applied to our situation, may be translated thus: legiance, or allegiance, is a tie or *ligamen*, because as it holds the subject or citizen to obedience,—so the state is held to protection; and this allegiance is *natural, acquired, or local*. Hence, a man naturalized, acquires allegiance to the state, or prince, as the case may be; so one who comes into a State is subject to local allegiance. Hence, if an alien friend come into a State, or into the United States, and commit treason, as he may, the indictment is *contra legiantie sue debitum*; but if an alien *enemy* is here, he does not owe allegiance, and so cannot be indicted for treason, but must be punished by *martial law*. 1 Hal. P. C. 59.

§ 4. But an *alien*, whether his country or sovereign be at peace or enmity with us, living here under the protection of our laws, owes a temporary local allegiance, and if he commit an offence, amounting to treason in a natural born subject or citizen, he may be dealt with as a traitor; so if an alien, having his family and effects here, under protection, goes to his own country in time of war, and adheres to the enemies of the United States, *for purposes of hostility*, he may be dealt with as a traitor; for he came and settled here under the protection of the laws, and though his person may be removed for a time, his effects and family continue under the same protection.

§ 5. But a distinction has been taken in England as to allegiance *criminliater*, and for commercial purposes. See this distinction considered in the case; *Wilson v. Marryat*, Ch. 40, a. 6; Ch. 131, a. 6. Many matters as to aliens and allegiance; see Ch. 131.

§ 6. We have no general oath of allegiance in the United States, but this short one, to wit: "I solemnly swear (or affirm) that I will support the constitution of the United States." This is not so properly an oath of allegiance as an oath of office; it is only taken by public officers, State and Federal, by aliens naturalized, and some few others, in virtue of particular statutes. The several States have their oaths of allegiance, and some of them very long.

ART. 4. *What is treason in the United States.*

§ 1. This is limited by the constitution, by which it is pro-

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3 Inst. 4, 11.—  
Co. L. 129.—  
7 Co. 5, 7,  
Calvin's case.  
—Vattel, 126  
to 178.—3  
Hall's Law  
Journal, 174,  
180.—4 Do.  
361.—1  
Hawk. c 17,  
s. 5, 6.—  
Salk. 46.—1  
L. Raym.  
282.

Foster, 185.—  
1 Hal. P. C.  
59, 60.—East,  
C. L. 53.—  
Kel. 38.—  
Kentucky  
Law, Dec.  
20, 1800, s. 4,  
punishment  
in the peni-  
tentiary, 6 to  
12 years.

Act of Con-  
gress, June 1,  
1789.

Art. 3, sect. 3.

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vided : " treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort ;" " and no person shall be convicted of treason, unless on the testimony of two witnesses to the same overt act, or on confession in open court." And all treasons against the United States, must be tried in their courts ; and all against a State, in its courts. By the same article and section, " the Congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood or forfeiture, except during the life of the person attainted."

Act of Congress, April 30, 1790, sect. 1.

§ 2. By this act it is enacted, " that if any person or persons, owing allegiance to the United States of America, *shall levy war against them, or shall adhere to their enemies, giving them aid and comfort* within the United States, or elsewhere, and shall be thereof convicted, on confession in open court, or on the testimony of two witnesses to the same overt act of treason, whereof he or they stand indicted ; such person or persons shall be adjudged guilty of treason against the United States, and shall suffer death." This is the description of two branches of treason, given in the 25 E. III. c. 2 ; therefore such constructions as these have been in England, on these branches, as to levying war and adhering to enemies, may be fairly made here on our treason laws. In Kentucky, only confinement in her penitentiary.

25 Ed. I. c. 2.

§ 3. This statute enumerates seven kinds of treason, but only two of them have any application to the United States. The words of this statute are, " if any man do levy war against our lord, the king, in his realm, or be adherent to the king's enemies in his realm, giving to them aid and comfort in the realm, or elsewhere, and thereof be proveably attainted of open deed by people of their condition," then &c.

Mass. C. & P. Laws, 61.

§ 4. In 1678, Massachusetts Colony passed a law, and enacted that whatever " persons within this jurisdiction shall compass, imagine, or intend the death or destruction of our sovereign lord, the king," or to depose him &c., and such compassings &c. " shall express, utter, or declare, by printing, preaching, or malicious and advised speaking, being legally convicted thereof, upon the oath of two lawful and credible witnesses, upon trial, or otherwise convicted by due course of law," then to be adjudged traitors, and suffer death.

Mass. C. & P. Laws, 294.

§ 5. In 1696, the same legislature enacted, " that if any person or persons shall compass or imagine the death of our sovereign lord the king, or of our lady his queen ; or of the heir apparent to the crown, or if any person *shall levy war* against our lord the king, or be adherent to the king's enemies, giving them aid and comfort in the realm, or elsewhere, and

thereof be probably attainted by open deed, by his peers, upon the testimony of two lawful and credible witnesses upon oath, brought before the offender, face to face, at the time of his arraignment, or voluntary confession of the party arraigned; or if any person or persons shall counterfeit the king's great seal, or privy seal, or the seal of the prince, and thereof be duly convicted as aforesaid," shall be deemed traitors, and suffer death, "and also lose and forfeit as in cases of high treason;" and the trial was to be regulated according to the laws of England in cases of treason &c. These statutes enacted the substance of 25 Ed. III., and, generally, the other British Colonies and Provinces did the same. Hence treason, in the Colonies and Provinces, was far more extended, and far more complicated, than it is, or ever has been, in our republic.

§ 6. By the declaration of rights annexed to this constitution of Massachusetts, it is provided that "no subject ought, in any case, or in any time, to be declared guilty of *treason* or felony by the legislature." This is a fundamental provision in the whole American system. No legislature in the United States can declare a man guilty of either of these crimes.

§ 7. Treason, from the French word *proditio*, imports a betraying, treachery, or breach of faith. *Writing* is held to be an *overt act*, when published. *Levying war* may be by taking arms under a pretence to reform religion or the laws, or to remove evil counsellors or other grievances, whether real or pretended. So to defend a fort against the public forces; so avowedly to raise an insurrection to pull down all inclosures, brothels, &c.; for it is a general defiance of public government. But to raise a force or tumult only to pull down a *particular* house, or a *particular* inclosure, is only a riot. And if two barons &c. fight, as in feudal times, with their forces, it is only a riot and contempt. But Hale (1 vol. 133) says, Burton's conspiracy to pull down inclosures, was treason only on 13 El.

ART. 5. *What is levying war.* See the cases last above, and Ch. 222.

§ 1. In this case, it was holden, that if a number of men, armed with weapons, offensive and defensive, are assembled with treasonable designs, this is an overt act, in every one of them, of this species of treason, though nothing further be done. But it is not in all cases levying war, to be in company of those who do it; as where the verdict found that divers persons, who were in company with those who levied war, joined them for fear of death. Held, this was not levying war.

§ 2. It was found by special verdict, that the deft., who was in company with the insurgents, hallooed, and had a staff in his hand, and that while he was among them, he was knocked

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Mass. Constitution, Declaration of Rights, art. 25.

4 Bl. Com. 75, 80.—Hal. P. C. 131, &c.—1 Haw. P. C. 37.—3 Inst. 10.—Keil. 76, 77.—1 Hal. P. C. 132.—1 Vent. 251.—4 Bl. Com. 82.—1 Hal. P. C. 136, 140.—East, C. L. 67.

5 Bac. Abr. 117, Vaughan's case.

East, 66, 67, &c.

Greene's case, Ld.<sup>1</sup> Raym. 1585.

**Cn. 199.** down by the king's soldiers, who came to suppress them, and  
**Art. 5.** was then taken; but as the verdict did not find he had consented  
 to the insurrection, or was aiding or assisting therein, the judges  
 all agreed that this was not an overt act of levying war; as it  
 was possible he might have been there only out of curiosity.

3 Inst. 9.—1  
 Haw. P. C.  
 37.

§ 3. Every assembling of a number of men in a warlike manner, with a design to withstand the king's lawful authority, is an overt act of levying war against him.

3 Inst. 10.

§ 4. An insurrection to raise the price of servant's wages, was adjudged to be an overt act of levying war; as this was done in defiance of the statute of labourers, it was done in defiance of the king's authority.

5 Bac. Abr.  
 118.—3 Inst.  
 10.

§ 5. An insurrection with a design to pull down all bawdy houses, is an overt act of levying war. So to alter the established religion; so to throw down *all* inclosures. Otherwise to throw down a *particular* one, for the intent is only to reform a *particular* grievance, and not *generally*, to reform the laws. So a conspiracy, with a design to levy war, is not a levying war, as there is no overt act of levying war.

1 Hal. P. C.  
 133.

§ 6. If divers conspire to levy war, and some of them do actually levy it, this is treason in all the conspirators; for in treason, all are principals, and here is a war levied.

1 Hal. P. C.  
 133.—2  
 Wils. 365.—  
 Co. P. C. 9,  
 10.

§ 7. If divers persons levy war to pull down all inclosures, or to expel strangers, or to remove counsellors, or against any statute, as the statute of *labourers*, or for enhancing salaries and wages, this is levying war; the offenders assume reformation by force.

1 Hal. P. C.  
 139.

§ 8. If divers persons levy war, and others bring them provisions &c. for fear of death, and recede from them as soon as they can, this is not treason, because *pro timore mortis*.

1 Hal. P. C.  
 146.

§ 9. A, in a real action, recovers possession against B, of a house &c., and a writ of seizin goes to the sheriff, and B holds it against him, with force, and assembles persons with weapons for that purpose, who keep the house with a strong hand against the sheriff, though assisted with the *posse comitatus*, this is not treason in B or his accomplices, but only a great riot. So if one keep possession against a restitution, upon an indictment of forcible entry. But if one fortify his house, or the house of another, with weapons defensive or invasive, purposely to make head against the king, and to secure himself against his forces, this is levying war.

Salk. 635,  
 Vaughan's  
 case.

§ 10. So cruising is a sufficient *overt act* of adhering, comforting, and aiding; as if Englishmen enlist themselves, and march, this is sufficient without coming to battle, and there may be *levying war* without actual fighting.

2 Wils. 36,  
 368, Drink-  
 water v Lon-  
 don As. Com.

Action on a policy against fire, proviso assurers not to be liable in case the house was burnt by reason of any invasion,

foreign enemies, or military, or usurped power. The house was burnt by a mob in Norwich; on a plea, burnt by a *usurped power*,—facts, a mob arose there on account of the high price of provisions, and destroyed a quantity of flour; it dispersed, on reading the proclamation; afterwards another mob arose, and burnt the malting-office insured. Judgment for the assured; and Wilmot C. J. observed, there are *rebellious* mobs which make *treason*, and *common mobs* which make *felony*. This was a common mob; here was no *species belli*,—it wanted universality of purpose to destroy, to make it a *rebellious* mob, or treason. No universality of purpose to destroy *all* houses, *all* inclosures, *all* bawdy houses, &c.; but it fell on two bakers and a miller, “and the mob chastised the *particular* persons, to abate the price of provisions, in a *particular* place. A common mob is easily dispersed by the courage or wisdom of an individual often; not so with armies &c. Hale takes the same distinction as to the object or purpose; also, holds, war must be *actually levied* to constitute treason. So the *private* quarrel between the two great earls of Gloucester and Hereford, in which horse and foot were assembled, and many men killed, and houses burnt &c. was not treason, because a *private* quarrel, but only a great riot and contempt. So to ride, “armed with men of arms, upon a private quarrel, or design against a common person, is not a levying of war,” so not treason. Hale mentions many cases like these, amounting to riots and contempts, or if death ensued, to felony. See cases of Fries & al. Ch. 222.

§ 11. An actual rebellion or insurrection, is a levying of war within 25 E. III., and by the name of *levying of war*, it must be expressed in the indictment. And an armed force, actually “marching in a body, *modo guerrino et modo insurrectionis*,” may be a levying of war within this statute.

*Weavers' case.* Many weavers, in and about London, offended at the engine looms, that tended to reduce the price of labour, agreed to rise, and go from house to house, and destroy them. Accordingly they assembled in great numbers, 300 in one place, 400 in others, and 1500 at Stratford-Bow, violently broke open houses, took and burnt the looms, and in some places the ribbons made by them; and this in several counties, and after several proclamations, and resisted the public officers; but they had no warlike arms, but staves, clubs, sledges, hammers, and other such instruments, to force open doors. Five judges held this treason and levying war, within the 25 E. III. as their numbers supplied the place of weapons of war, and their design was to destroy engine looms in general, in several counties. But other five judges held it not treason, as there was no conspiracy against the king's per-

Ch. 199.  
Art. 5.

Co. P. C. 10.  
—1 Hal. P.  
C. 135, 137,  
148.

1 Hale's P.  
C. 144.—Co.  
P. C. 10.

1 Hale's P.  
C. 143, 146,  
The Weav-  
ers' case.

CH. 199. son &c., or to arm themselves ; and they doubted if a design  
 Art. 6. to burn engine looms, was a design to levy war against the king ; as it was not like the designs of altering religion, laws, &c., but only a *particular* quarrel, between men of the same trade, about a particular engine, they thought a grievance &c. ; and finally, they were punished for a riot.

1 Hale's P.  
 C. 149 ; and  
 25 E. III.

§ 12. As treason, *by levying war*, in England, must consist of two principal parts, or ingredients, to wit : 1. It must be a levying of war : 2. It must be a levying of war against the king. So in the United States it must be, 1. As in England : 2. A levying of war against *them* ; they, to this purpose, being in his place.

1 Hale's P.  
 C. 154, 155.  
 —Co. R. 11.  
 —7 Co. 53,  
 Calvin's case.

§ 13. There is one material difference between 25 E. III. and the law of the United States. By 25 E. III. levying war is confined to the realm of England, construed to include only England, and the four narrow seas ; not Scotland, Ireland, the Colonies, nor the high seas. (Our act of Congress, respecting levying war &c. within the United States, or *elsewhere*.) Hence 35 H. VIII. c. 2. was passed, to punish treasons *done out of the realm*. And it was held, in Macguire's case, (an Irish peer,) that he might be tried in England for treason in Ireland, on this statute, 35 H. VIII. as for a treason committed out of the realm ; and on the same principle it was held, one might be tried in England, for treason committed in the Colonies. And therefore, this statute was viewed by them as a great grievance, in the early parts of our revolutionary contest.

5 Mod. 206,  
 208, Rex v.  
 Cowper.

§ 14. *Per curiam*. "The very intention to commit treason is regarded in law ; and any preparation to assist the king's enemies, is a prejudice to the public, and therefore, an offence at common law." Deft. was fined 100 marks, as for a misdemeanor ; he prepared boats &c. to aid Louis XIV. in time of war, but was taken, when about to sail from England in them.

1 E. VI. c.  
 12.—5 & 6  
 E. VI. c. 11.  
 7 W. III. c. 3.

Several other English cases of levying war, and some reasoning upon them, East's C. L. 66 to 77, and many authorities there cited. To what points, there must be two witnesses, and what not, but one, as at common law. M'Nally, 11, 183 &c. Our constitution requires two witnesses to the *same overt act*, but does it require two to any *collateral* fact. See the English distinctions, M'Nally, 11 &c., 183, 187 ; and English Statutes ; and Kelynge, 18 ; Fos. C. L. 240 to 244 ; 2 Hale's P. C. 304 ; 3 Inst. 25.

4 Cranch,  
 605, Append.  
 United States  
 v. Burr.

ART. 6. *Levying war—American cases*. In this case, Aaron Burr, in the year 1806, or 1807, was indicted for levying war against the United States ; and it seems to have been held,

§ 1. To levy war is to raise, create, make, or carry on war. CH. 199.  
Art. 6.

§ 2. If an army be actually raised, for the avowed purpose of carrying on war against the United States, and to subvert their government, a commissary of purchases, who never saw the army, but who knowing its object, and leaguering himself with the rebels, supplies that army with provisions, is guilty of an overt act of levying war.

§ 3. So is a recruiting officer, who, though never in the camp, executes the particular duty assigned him.

§ 4. The term, "*levying war*," is used in the constitution of the United States, in the same sense it was understood in England and this country, to have been used in the statute of 25 E. III. from which it was borrowed.

§ 5. All those who perform the various military parts of prosecuting the war, which must be assigned to different persons, may be said to levy war. And those who *perform a part*, in prosecuting the war, may be correctly said, to levy war. But one's treason must be laid, where his act of treason is done.

§ 6. Where a body of men are assembled, for the purpose of making war against the government, and are in a condition to make war, the assemblage is an act of levying war. But this condition must have *speciem belli*.

§ 7. The assemblage of men, which will constitute levying war, must be a *warlike* "assemblage," carrying the appearance of force, and in a situation to practise hostility.

§ 8. To assemble an army of 7000 men, is to place those who are assembled, in a *state of force*.

§ 9. A person may be concerned in a treasonable conspiracy, and yet be *legally*, as well as actually *absent*, while some one act of the treason is committed.

§ 10. Every one concerned in a treasonable conspiracy, is not, constructively, present, at every overt act of the treason, committed by others, not in his presence.

§ 11. A man may be legally absent, who has counselled, or procured the treasonable act.

§ 12. Levying war is an act compounded of law and fact, of which the jury, aided by the court, must judge.

§ 13. Appearing at the head of an army, would be an *overt act of levying war*. So also detailing a military corps from it, for military purposes.

§ 14. But if the war be actually levied, if the accused has performed a part, but *is not leagued in the conspiracy*, and *has not appeared in arms* against his country, he is not a traitor.

§ 15. *Constructive treason*, is where the direct and avowed object is not in the destruction of the sovereign power.

CH. 199.

Art. 6.



§ 16. An assemblage of men, with a treasonable design, but not in force, nor in a condition to attempt the design, nor attended with warlike appearances, does not constitute the fact of levying war.

§ 17. The travelling of several individuals to the place of rendezvous, either separately or together, but not in a military form, would not constitute levying war. The act must be unequivocal, and have a warlike appearance.

§ 18. War can only be levied by the employment of an *actual force*. Troops must be embodied; men must be openly assembled in *more guerrino arraiati*.

§ 19. Arms are not an indispensable requisite to levying war; nor the actual application of force to the object.

§ 20. A person cannot be, constructively, present at an overt act of treason, unless he be aiding and abetting at the fact, or ready to afford assistance, if necessary.

§ 21. A person in one part of the United States, cannot be considered as *constructively present* at the overt act committed in a remote part of the United States, so as to be indicted where this act is committed.

§ 22. It is not sufficient that an indictment for treason allege, generally, that the accused had *levied war* against the United States. The charge must be more particularly specified, by laying an *overt act of levying war*, and this overt act must be proved as laid.

§ 23. The prisoner can only be convicted upon the overt act laid in the indictment. If other overt acts can be inquired into, it is for the sole purpose of proving the particular fact, charged as the overt act of treason.

§ 24. If the particular overt act of treason charged, be advised, procured, or commanded by the accused, he is guilty, *accessarily*, and not *directly*, as principal.

§ 25. The presence of the party, where presence is necessary to the guilt, is part of the *overt act*, and must be proved by two witnesses.

§ 26. An indictment, charging a person with being present at an overt act of treason, cannot be supported by proving only that the person accused, caused the act to be done by others, in his presence. No presumptive evidence, no facts, from which presence can be inferred, will satisfy the constitution and the law.

§ 27. The part which a person takes in the war, constitutes the overt act, on which alone he can be convicted.

§ 28. If the overt act be not proved by two witnesses, so as to be submitted to the jury, all other testimony is irrelevant.

§ 29. The conviction of some one who has committed the

treason, must precede the trial of him who has advised or procured it; and the right of the prisoner to call for the record of conviction, is not waived by pleading to the indictment. CH. 199.  
Art. 6.

§ 30. *Quare*, if the crime of advising or procuring a levying of war, be within the constitutional definition of treason?

§ 31. *Quare*, if he who has *procured* an act, may be indicted as having *performed* the act.

§ 32. *Quare*, if he who counsels and advises, but performs no act in prosecution of the war; or he, who being engaged in the conspiracy, fails to perform his part, can be said to levy war.

§ 33. To constitute a levying of war, there must be an assemblage of persons for the purpose of effecting, *by force*, a treasonable purpose. Enlistment of men to serve against government, is not sufficient. 4 Cranch, 75,  
136, United  
States v. Boll-  
man and  
Swartwout.

§ 34. Treason is a crime known at common law; and treason is nothing more than a criminal attempt to destroy the government: may be committed before the different qualities of the crime are defined, and its punishment declared by positive law. *Quare*. 1 Dallas, 53,  
57, was be-  
fore the Fed-  
eral consti-  
tution &c.

§ 35. When war is levied, all those who perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are traitors. 4 Cranch, 75,  
Case of Boll-  
man & al.

§ 36. Any assemblage of men for the purpose of revolutionizing, *by force*, the government established by the United States in any of its territories, though as a step to, or means of, executing some greater projects, amounts to levying war.

The travelling of individuals to the places of rendezvous, is not sufficient; but the meeting of particular bodies of men, and their marching from places of partial, to a place of general rendezvous, is such an assemblage as constitutes levying war. It is material, under this head of levying war, always to keep in mind, that many mere conspiracies to levy war, are made treason, by numerous special acts of parliament, not in force in the United States. As these make particular cases treason, and often make mere conspiracies to levy war treason, though no war be, in fact, levied, we are misled, if we think such cases constitute treason in the United States. As we follow only 25 E. III. we must exclude all other English statutes on this subject. Hale, speaking of that statute, says, "A conspiracy, or compassing to levy war, is not a levying war within this act, *unless war be levied*." He adds, this appears by many acts of Parliament, which were but temporary, "whereby it is specially enacted, that such compassing

1 Hale's P.  
C. 132, 133,  
&c. 145.

CH. 199. to levy war, shall be treason, which need not have been, if it  
 Art. 7. had been treason by the statute of 25 E. III." mentions Bur-  
 ton's case. He and others conspired to assemble, and pull  
 down inclosures &c., and adds, "they were indicted and  
 attainted purely upon the statute of 13 El. c. 1, whereby  
 conspiracy to levy war is made treason." On the whole, but  
 a few English cases apply to our country, even as to treason,  
 by levying war, in fact only those few decided on the 25 E.  
 III. And it is clear our court took the true distinction in this  
 respect, in Burr's case; which distinction has not been suffi-  
 ciently attended to in our State courts, in sundry cases.

Burton's  
case.

Several other English cases of adhering to the enemy &c.  
 East's C. L. 77 to 83. As one's not returning from an enemy's  
 country, when required by his government to return &c. may  
 be evidence of such adherence.

East's C. L.  
117.—Fost.  
197, 211.—2  
Hale, 121,  
144.—East's  
C. L. 118,  
119.—Fost.  
198.—4 El.  
Com. 80.

It is a general rule, that no overt act can be given in evi-  
 dence under any branch of treason, unless it be expressly  
 laid as an overt act of such treason, though it be laid as an  
 overt act of some such other treason in the same indictment;  
 yet it is said, that one species of treason may be laid, and  
 proved as an overt act of another. Though mere words can-  
 not amount to treason, they may expound an overt act of  
 treason, and shew with what intent it was done. Cro. Car.  
 332. So writings not published, will not constitute an act of  
 treason, yet may be proved as evidence of a treasonable in-  
 tention in some other overt act done, when clearly applicable  
 to it; and such writings, found in the custody of the accused,  
 are admissible evidence, without any proof the hand-writing  
 is his. As in cases of Tooke and Stone, A. D. 1794, 1796.  
 But in an indictment for treason, it is not necessary to state  
 evidence of overt acts of treason, it is enough to state the acts  
 themselves, and adduce the evidence, to prove them in the  
 trial. It is sufficient to state the charge with reasonable cer-  
 tainty, so that the accused may be apprized of the nature of  
 it, so as properly to prepare for his defence.

East's C. L.  
121.—3 Hale,  
122.—Fost.  
194, 220.—4  
St. Tr. 696.

ART. 7. *What is adhering to the enemy—giving aid and comfort.*

6 D. & F.  
527, A. D.  
1796, Rex. v.  
Wm. Stone.

§ 1. This was an indictment for adhering to the king's  
 enemies &c. The evidence was of conspiring with A. B.  
 and others unknown, to collect intelligence, within England  
 and Ireland, of the disposition of the people, in case of an in-  
 vasion, and to communicate such intelligence to the rulers of  
 France. A was in France, and B, generally, in Ireland.  
 Held, as there was evidence of the common design and con-  
 spiracy, a treasonable letter written by B, in pursuance of  
 that design, was evidence against all. As where a number  
 agree to commit a burglary, the act of him who breaks the

house, is the act of those who watch at a distance. Any intelligence sent to the enemy, to enable them to shape their attack or defence, though the purport of it may be to dissuade them from an invasion, is high treason, and though the letter &c. be interrupted; but the jury found Stone not guilty. CH. 199.  
Art. 7.

§ 2. This adhering &c. must be proved by some *overt act*, as also by giving them intelligence, by sending them provisions, and selling them arms; by treacherously surrendering to them a fort &c. To assist mere foreign pirates, and robbers, who attack our coasts, without any commission from their prince or government, is clearly treason. To assist *actual rebels* at home, is to levy war; but a rebel is not an enemy, if an enemy is purely a question of fact; so to be decided by the jury exclusively. 4 Bl. Com.  
82, 83.—  
Fost. 216.—  
3 Inst. 10.

§ 3. *Who are enemies.* It is not necessary that those aided be enemies by a declaration of war. Therefore, if any of the subjects of a state, in amity, have commenced, or have made preparations for commencing hostilities against our nation or state, those are enemies within the meaning of the words, as used in 25 E. III. and in our Federal constitution. Hence it was held, that the Scots, who invaded England in Queen Elizabeth's time, were enemies, though then there was no war between England and Scotland. It was sufficient the Scots had commenced hostilities against England, and acted as enemies. And the Duke of Norfolk, by adhering to the Scot party, adhered to an enemy 1 Hale's P.  
C. 164.

§ 4. So if the French king, in time of peace, send an army to one of the sea-ports of France, with a design to invade any part of the British king's dominions, every French subject in that army, would be one of his enemies. So adhering to the subjects of a state at war with his allies, is adhering to his enemies. As if the states of Holland be in alliance with England, and the French at war with England, and certain Dutchmen fight under command of the French king—they are enemies to England, and subjects of France. For the French subjection makes them subjects of France, in respect of all other nations but their own, and if such cruise at sea, and an Englishman assist them, he is a traitor, but not a pirate, for none are pirates who act under the command of a sovereign prince. So where the fighting is directly against an ally, it is adhering to an enemy; as where an Englishman assisted the French, at war with England, and he fought against Spain, an ally of England, this was adjudged treason, as adhering to the enemies of England; for hereby the enemies of England were strengthened and encouraged; and he as much aided the French enemy by thus fighting against England's ally, in the war, as by fighting against England 1 Hale's P.  
C. 164.—3  
Inst. 11.—6  
Bac. Abr.  
119, Duke of  
Norfolk's  
case.

State Trials,  
p. 37, Vaugh-  
an's case.—  
Salk 635,  
Vaughan's  
case.

CH. 199. herself, in the same war. And it was said, it was sufficient  
 Art. 7. to lay the treason in the words of 25 Ed. III. This must



mean as to adhering to an *enemy*, not as to the overt act; for in the same case, as stated, post, it is laid down, that *some overt act* must be *particularly* alleged in the indictment. These points were decided and settled in Vaughan's case, who was indicted for treason, in adhering to the English king's enemies, with many subjects of France, enemies of the king; and that they did navigate a certain vessel, called *Clancarty*, with a design to destroy the king's ships. Held, that an indictment for levying war, or adhering to the king's enemies, generally, without shewing particular acts or instances, is not good; for the words of the statute are, *and thereof be proveably attainted by some overt deed*, which comes after the particulars of compassing the king's death, levying war, and adhering to the king's enemies. And Holt C. J. said, a *distinct overt act*, (not alleged,) could not be given in evidence, unless it related to that which was alleged, or conduced to the proof of it: but if it conduce to the proof of an overt act alleged, it is good evidence. "As if consulting to kill the king be alleged, any actings or doings, in pursuance of that consultation, may be proved; for it proves their agreement and consent, and is a fair manifestation of the act alleged in the indictment."

3 Inst. 11 —  
 Hale's P. C.  
 164, 169.—  
 1 Haw. P. C.  
 39.—5 Bac.  
 119.

§ 5. *What adhering to enemies.* Not aiding rebels; but this may be levying war. Giving any kind of aid or comfort to enemies, is an overt act of adhering to them. Surrendering a fort to them for reward, is an overt act of adhering to them; but not if cowardly done.

2 Vent. 315,  
 Harding's  
 case.

§ 6. So enlisting a man, and sending him into the service of an enemy, is an overt act of adhering to him. But if an Englishman reside in a state at war with England, and give no assistance to carry on the war, this is not an overt act of adhering to an enemy. But sending letters of advice or intelligence to subjects of a state at war, is such act, though the letters be intercepted at the postoffice, and do not go.

5 Bac. Abr.  
 120.

3 Inst. 9, 10.  
 —Hale's P.  
 C. 13, 14.—  
 Keil. 19.—1  
 Haw. P. C.  
 38.

§ 7. A conspiracy, with intent to give aid or comfort to enemies, is not an overt act of adhering to them; for as the words are, *is adherent*, an actual adherence is necessary to complete the offence. But if there has been such a conspiracy, and the intended aid or comfort be afterwards given, the conspiracy is an overt act, in every one of the conspirators, of adhering to enemies. For there can be no accessaries in treason; then, when all combine to do the act, and one or more does it, the treason is, in fact, committed, and all are principals, as all have a part in it. To adhere to our

1 Dal. 33, 35.

own troops, though the consequence of mistaking them for the enemy, is not treason. Ch. 199. Art. 8.

§ 8. Enlisting, or procuring any person to be enlisted into the service of the enemy, is clearly an act of treason. But there must be an actual enlistment, to make the persuader a traitor. 1 Dal. 39. 2 Dal. 86, 88, Commonwealth v. M'Carty.

And nothing will excuse the act of joining an enemy, or levying war, but the fear of immediate death. And see in this case what constitutes treason, by levying war against the United States, and how to be proved. Same v. Mitchell, 348. 2 Dal. 346, United States v. Vigol.

§ 9. Acting as a soldier, by command of a superior, is no excuse for treason, whom the soldier thinks he must obey; for the superior himself is a traitor; his command, treason; and there, obedience to that command is also treason. Kelynge. 13.

§ 10. If war commence between France and England, and Englishmen are residing in France, they do not adhere to enemies, unless they aid them, or refuse to return home, on being required so to do, and their continuing in France, after so required, is only evidence of adherence. Nor is it adherence, if an Englishman goes to France during a truce; nor if he invites a king, *at peace*, to invade England, as this king is not an enemy at the time of the act. But if a prisoner of war do voluntarily swear allegiance to his captor sovereign, it is adherence to enemies, if during the war;—but otherwise, if done for fear of death. Where several overt acts are laid in the indictment for treason, the proof of any one maintains the indictment. Foster's C. L. 194, The King v. Lowick; same v. Laver; 4 St. Tr. 718. And the indictment is good, if one overt act is well laid. Foster's C. L. 194. 1 Hale's P. C. 165, 166, 167. 2 Haw. P. C. ch. 46.— 1 Hale's P. C. 122.— M'Nally, 351

#### ART. 8. *American proceedings in treason.*

§ 1. A very great proportion of the English forms and modes of proceeding in cases of treason, have little or no application to our country; for nineteen twentieths of the English treasons have no existence here; as all as to the persons of the king, queen, and heir apparent, great and privy seal, privy signet or sign manual: counterfeiting or diminishing the current coins and monies, and importing money; as to the See of Rome, Pope's bulls and orders, refusing the oath of supremacy, in regard to the English succession to the crown, &c., &c. But the English forms of indictments and pleadings in regard to treasons, in levying war, and in adhering to the enemies of the United States, are pertinent and useful; and in our pleadings in such cases, have been invariably resorted to. The principles held in Vaughan's case, above stated, to wit, that a particular *overt* act must be laid in the indictment, and proved as laid, and that no other *overt* act can be proved, but as it induces to prove the one alleged, were evidently fol-

CH. 199.  
Art. 8.



lowed by our court in Burr's case, mentioned above. These two important principles run through all indictments for treason, not only or merely for the reason mentioned in Vaughan's case, the words in the statute, *attainted &c.* by some *overt* deed, but on general principles; for if the accused be only charged in the indictment, with levying war, or adhering to enemies, it is generally impossible for him to prepare in time, for his defence, against a charge so general. But it is obvious on the sound principles that govern in pleadings generally, and especially in capital cases, that some specific *overt* act be particularly stated in the indictment, to which the deft. is to answer, and to no other, but as others may prove this one stated; and of course the trial is confined to the question, solely,—Is he guilty, or not, of this *overt* act, specially laid and described in the indictment? And the jury's verdict, and the judgment in the case, can relate to no other act of treason. He must be found guilty of this, or acquitted.

3 Salk. 359,  
Rex v.  
Speake.

1 Wils. 157,  
Rex v. Kin-  
lock.

§ 2. It is an essential rule in England, and here also, that the deft. be inquired of, if he has any thing to say in his defence; and it is error if this inquiry be not made.

§ 3. So in both countries, if a jury be sworn to try a traitor, it may be withdrawn by his consent, and then a second jury may be sworn to try him. Held, by nine judges against one. He, at first, pleaded not guilty; and a juror was withdrawn to let him in to plead to the jurisdiction; this overruled, he again pleaded not guilty; and being found guilty, he moved in arrest of judgment, on the ground a man cannot be arraigned twice in a capital case; but the dissenting judge held, *totis viribus*, "that no man can be put twice upon the trial of his life for one and the same crime; not even by his own consent."

1 Wils. 217,  
Ramsden &  
al v. Mac-  
donald.

§ 4. This was an action of debt on a bond against the deft. attainted of treason, by cause of a judge, his counsel moved, that he might be discharged, because so attainted, and his body, and his estate were the king's. Held, he was liable in this civil action. This principle is equally good law in the United States.

Dougl. 590,  
Rex v. Lord  
George Gor-  
don.

2 Dallas, 343.  
-1 Dallas, 33.

§ 5. Held, that a person indicted for treason is entitled to a copy of the indictment, and a list of the witnesses for the crown, and of the jurymen, ten days before his arraignment; and it is treason to attempt, by intimidation and violence, to compel the repeal of a law. So the principles of this case are adopted in the United States; and they result from the general principles of our constitutions and laws.

4 Dallas, 168.  
-Kelynge, 15.

§ 6. Attainder for treason does not forfeit the estate of tenant by the curtesy *initiate*; but does of tenant in tail in England. 1 Cruise, 51, 172, 500, 550; 4 Cruise, 63.

"If an indictment be for levying war, and that made the treason for which the party is indicted, in that case it is local, and must be laid in the county where, in truth, it was." CH. 199.  
Art. 9.

§ 7. By this act, if one, indicted for treason, stands mute, a jury is immediately impannelled to inquire if so by the providence and act of God, or fraudulently, wilfully, and obstinately; if they return the former, he is remanded; if the latter, the court causes the plea of not guilty to be entered, and goes to trial on it. Mass. act,  
1777.—  
Maine act,  
ch. 1.

§ 8. And by this act, if the prisoner stands mute when indicted for any other capital offence, the court goes to trial, as if he pleaded not guilty. As to treason against the United States; see also Synopsis; and Ch. 221, a. 7. Mass. act,  
Feb. 15, 1796.

§ 9. By section 29 of this act, any person indicted of treason shall have a copy of the indictment, and list of the jury and witnesses, three days before the trial &c. Act of Cong.  
Apr. 30, 1790.

Many legal opinions respecting treason, will be found in the trial of Judge Chase, for his conduct in the case of Fries, indicted for treason; as also Vigol, Mitchell, &c. stated in Ch. 222.

The French Penal Code invariably defines and states the acts that amount to treason, and crimes against the state, and punishes treason with death and confiscation of estate, saving the rights of creditors, and some family rights, &c. But by this code, these punishments are extended to all intrigue and correspondence with enemies by a Frenchman, to favour their operations against France, or her allies. Article 75 to 79. So to those entrusted with or officially apprised of, the secret of a negotiation, or expedition, who shall betray it to a hostile power or to its agent; and to several other cases.

ART. 9. *Misprision of treason.*

§ 1. By this act it is enacted, "that if any person or persons having knowledge of the commission of any of the treasons aforesaid, shall conceal, and not as soon as may be disclose, and make known the same to the president of the United States, or some one of the judges thereof, or to the president or governor "of a particular State, or some one of the judges or justices thereof, such person or persons on conviction shall be adjudged guilty of misprision of treason;" and be imprisoned, not exceeding seven years, and fined, not exceeding \$1000. (Spelt by Congress, *misprison*.) April 30,  
1790, sec. 2.

§ 2. This act provides, "that concealment or keeping secret any treason, be deemed and taken only misprision of treason;" and the offender forfeits to the State his goods and chattels, and the profits of his lands during his life, and may be imprisoned, not less than two, nor more than five years. Section 5, if any one know of any treason to be committed, Mass. act,  
1777, sec. 4.  
--Mass. Laws,  
1047.—Act  
of Maine,  
ch. 1.

CH. 199. (and is not party or consenting to it); and shall not, in a reasonable time, inform thereof, on oath, to one of the justices of the Superior Court &c., or some justice of the peace, to the end to apprehend the offender, shall be deemed to be guilty of misprision of treason, or concealment of treason, (spelt *misprision*.)

Art. 9.

4 Bl. Com.  
119, 121.—  
Cites 1 Haw.  
P. C. 56.—  
East's C. L.  
139, 140.

Misprision or concealment of treason, is the same in substance in every State. It is from the French word *mespris*, a neglect or contempt: is a high offence in our law; and according to Blackstone, misprisions are all such high offences in the English law, as are under the degree of capital, but nearly bordering thereon. He says, misprisions are of two sorts or kinds: 1. Negative, where something is concealed that ought to be revealed: 2. Positive, where an act is done that ought not to be done. "Of the first kind is the misprision of treason, consisting in the bare knowledge and concealment of treason, without any degree of assent thereto; for any consent makes the party a principal traitor, as the concealment which was construed aiding and abetting did at common law." By statute, a bare concealment is a misprision. "But if there be any probable circumstance of assent, as if one goes to a treasonable meeting, knowing before hand that a conspiracy, is intended against the king; or being in such company once by accident, and having heard such treasonable conspiracy, meets the same company again, and hears more of it, but conceals it, this is an implied assent in law, and makes the concealor guilty of principal high treason." Misprision in the English books often means *premunire* or contempt. It took its rise from the power claimed by the Pope in England, and to suppress this power sundry statutes were passed; "and the original meaning of the offence called *premunire*, was the introducing a foreign power into England." But this word now is applied to very different offences; and never has been of much use in the United States.

4 Bl. Com.  
102, 115,

3 Com. D.  
442.—Kelynge, 21, 22

3 Inst. 138.

Kelynge, 12.  
—H.P.C. 127.

Kelynge, 17.

To conceal a treason, though made so by statute, is a misprision; and if A know of a treasonable design, and of the persons concerned, it will be misprision though he say, generally, that there is a plot; for he ought to discover all that he knows of the affair; for notwithstanding his saying, there will be a rising, or that there is a plot &c., both the treason and the traitors are concealed by him. But one cannot be guilty of misprision without knowing the design and the persons; but it is treason, knowingly to receive a traitor and comfort him: so to assent to it; and if any one do a thing, shewing he likes or approves the traitorous design, he is a traitor; "for all are principals in high treason, who contribute towards it by actual approbation;" and Sir Everard Digby, in the powder treason, met with the traitors, and heard their design, but upon the evi-

dence it was not proved that he said any thing, or acted any thing, yet he had judgment of treason; but it is to be inferred, he knew beforehand for what purpose the meeting was to be; for it is said in the same page, that "if a person not knowing of their design before, come into their company, and hear their discourses, and say nothing, and never meet with them again at their consultations, that concealment is only misprision of high treason."

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§ 3. If A tell B, generally, that there will be a rising, without acquainting him with the persons who are to rise, or with the nature of the plot, if B conceal this, this is no misprision of treason, because he hath no knowledge of the treason; for a man cannot be said to conceal what he doth not know.

Kelynge, 21.-  
1 Hawk. 87.

§ 4. In an indictment for treason, the words *contra legiantie sua debitum*, are essential, and judgment will be reversed for want of them; and indictments are not to be supplied by intendment. But surplusage in laying too many *overt* acts, or in describing any one, may be rejected. So it is sufficient that the *overt* act was committed before the indictment was found, and in the county in which laid; and after proof of an *overt* act in the county in which the treason is laid, evidence may be given of any other *overt* acts of the same species of treason in other counties. One witness is sufficient to collateral facts, as the place of the accused's birth &c.

2 Salk. 630,  
Tucker's  
case.

East's C. L.  
124, 125, 126,  
several cases,  
and 130, 135.

§ 5. *When writing is an overt act of treason or not*: is so when clearly relative to any previous formed design of dethroning and murdering the king, though not published, and may be read in evidence as *overt* acts of treason, being specially laid in the indictment. As were the papers found in the custody of Lord Preston, on his way to France, so read in his trial, as being in relation to his previously formed design of treason; but not if not published, and no such previous formed design; as Sidney's case, and Peacham's case.

Foster's C.L.  
198—4 Bl.  
Com. 81.—1  
Hale's P. C.  
118.—McNally,  
290, 294.—  
Gilb. Evid.  
by Loft, 787.

So writings published, as to levying war &c., are overt acts of treason; and in Preston's case, papers found in his custody after he had gone on board a boat, on the Thames, and was in the act of going to France; and his conduct evinced evident circumstances of fear and concealment, which argued the intent of his voyage to be of a like nature, with that which the letters were called for to prove, so read without proving hand writing. On this case Loft justly observes, that the point here was not a case of mere custody, as in Sydney's case; but a case of custody and conveyance connected with the overt act laid in the indictment, of passing on the sea, and departing towards France, with intent "to deliver the traitorous instructions, to the king's enemies in the said kingdom, then at war with England." See Ch. 197, a. 6.

CH. 199. In Ireland, two witnesses are not necessary in cases of high treason. Curran's Life, page 248.

Art. 10.



ART. 10. *Public ministers, agents, &c.* As ambassadors, ministers plenipotentiary, &c. represent their sovereigns, and the sovereign power, crimes by or against them, nearly affect the state they represent, or to which they are sent. These crimes are of two sorts: 1. Those committed in violation of their privileges: 2. Those committed by them.

Constitution  
of the United  
States, art. 2,  
sect. 2.

§ 1. By this constitution, the President, with the advice and consent of the Senate, has power to make treaties, provided two-thirds of the Senate present concur; to nominate and appoint ambassadors, other public ministers and consuls. He shall receive ambassadors and other public ministers. Section 3, the Federal judicial power extends to all cases (among others) affecting ambassadors, other public ministers, and consuls; and in all cases affecting ambassadors, other public ministers, and consuls, the Supreme Court has original jurisdiction.

Art. 1, sect. 9.

"No title of nobility shall be granted by the United States, and no person, holding any office of profit or trust under them, shall, without the consent of Congress, accept of any present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign state."

Act of Con-  
gress, April  
30, 1790.

§ 2. By the 25th section of this act, no process or writ can be sued out of the courts of the United States, or from any court of a particular State, or of any judge or justice therein, "whereby the person of any ambassador or other public minister of any foreign prince or State, authorized and received as such by the President of the United States, or any domestics or domestic servant of any such ambassador or other public minister, may be arrested or imprisoned, or his or their goods or chattels, be distrained, seized, or attached, such writ or process shall be deemed and adjudged to be utterly null and void to all intents, constructions, and purposes whatsoever." Section 26; and any person suing out the same, "and all attorneys or solicitors, prosecuting or soliciting in such case, and all officers executing any such writ or process, being thereof convicted, shall be deemed violators of the law of nations, and disturbers of the public repose, and be imprisoned, not exceeding three years, and fined at the discretion of the court."

§ 3. This law is so plain, and so clearly secures the exemptions of foreign ministers, resident here, their domestics and domestic servants, their goods and chattels, from arrests and attachments, that no comments need be made upon it. This protects them from suits.

1 Bl. Com.  
253, 254,  
257.

§ 4. "The rights, the powers, the duties, and the privileges of ambassadors are determined by the law of nature and nations, and not by any municipal constitutions." "Their ac-

tions are not subject to the controul of the private laws of the state wherein they are appointed to reside." They are not to be prosecuted for any debt or contract in the courts of the country in which they reside. CH. 199. Art. 10.

§ 5. In this case, an ambassador's servant arrested, was discharged on motion; and held, it was not necessary he should lie in the ambassador's house; but that he must do some actual service therein, to make him a servant; and he must be *bona fide* menial and domestic. "The deft. was retained by the Sardinian envoy, as his master of the horse:" so "neither a domestic nor a menial servant." Deft. not allowed any privilege. Stra. 797, Evans v. Hicks—2 Ld Raym. 1524.—1 W. Bl. 48, Pottier v. Croza.

6. An ambassador owes not even local allegiance to the prince to whom he is sent. 1 Bl. Com. 373.

§ 7. The common law recognises the rights of ambassadors, and immediately stops all process sued out against them. 4 Bl. Com. 70.

§ 8. Our act of Congress extends not to any inhabitant of the United States who contracts debts before he enters such service; nor to any such servant or domestic, unless his name be first registered in the office of Secretary of State &c. Fine and imprisonment is the punishment for assaulting &c. a minister, or making any other infraction of the law of nations, by off ring violence to such minister. Act of Congress, April 30, 1790, sect. 27, 28.

§ 9. If a chaplain to an ambassador do no duty in his house, he shall not be protected. 3 Wils. 20, Seacomb v. Bowlney.

§ 10. If an Englishman be a secretary to a foreign ambassador, and at the same time a purser of a ship of war, he is not protected; for he cannot serve the king and minister both together, and so in fact is not a servant of the ambassador. 4 Burr. 2015, Heathfield v. Chilton. 3 Wils. 33, Daling v. Atkins.—1 Wils. 78.

§ 11. An English secretary to a foreign minister is privileged from arrests, though formerly a trader, and now under very suspicious circumstances. 1 W. Bl. 471, Bath's case.

On the deft's. affidavit, stating he was truly employed by the Swedish minister in London, as his secretary, in transcribing state papers relative to his embassy &c.; held, the deft. was privileged from arrest, though his name was not registered at the office of either of the Secretaries of State. 3 D. & E. 79, 80, Hopkins v. De Ro-beck.

Held, a person who had been consul-general from the Porte, but was dismissed several months before, and another appointed in his place, was not privileged from arrest, though not notified of his dismissal. 9 East, 447, Marshall v. Cretico.

§ 11. The public minister of a state is usually a person who is charged with its public affairs at a foreign court; though sometimes the name is applied to ministers of state at home. It has been truly observed, that the United States of America, Marten's Law of Nations, 195, 260. Many authorities cited, also Grotius,

Vattel, Puffendorff; many particular cases, cited by Marten's De Real.

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though out of Europe, have fully adopted the European system in relation to such ministers. The right to send them is inherent in the right of sovereignty; and to this purpose, every state is sovereign, that can make peace and war, and form alliances in its own name. To this purpose, neither of our individual States is sovereign, nor was it under the old confederation. Wherever the sovereignty of a state ceases, this right ceases. All those, and those only, which can send public ministers, can receive them. As each sovereign has a right to refuse them, so he may prescribe the terms on which he will admit them, and of their residence.

§ 12. *Different grades of public ministers.* In former times there were none but ambassadors. In the private concerns of sovereigns, agents were employed, and often deputies, at Congress. But in the fifteenth century, ambassadors became ministers in many cases, under the title of *residents*; and soon after agents become *charges des affaires*. Now between ambassadors and residents, envoys are employed. Ambassadors extraordinary have ever held the first rank; they have been viewed as representing the *sovereign*; but ministers of the second grade only as representing the *affairs* of the sovereign. So envoys and ministers plenipotentiary are of the second degree or order: Of the third, are ministers resident, residents, and ministers *charges des affaires*. To manage private or small affairs, agents, residents, counsellors of legation, titular agents, are usually appointed; and are all excluded from the titles, immunities, or privileges of public ministers. So deputies, often employed in conventions, are not properly public ministers; they are sometimes sent by towns or colonies to their sovereigns; so were agents frequently by our Colonies. Not only crowned heads, but republics, as Genoa, Venice, and even Malta, and German States, included in the empire, have been, and are, allowed to send and receive ministers of all orders. But there are some exceptions as to the highest order. Each order may have a retinue or family according to its rank; this is mentioned always in the letter of credence; as the authorities given are in the full powers. As to instructions to ministers, they keep them private, or not, according to circumstances. Strictly the title of excellency belongs only to ambassadors, and formerly they alone had public audiences; now of various kinds. Generally residents and *charges des affaires* only deliver their credentials to the minister of state. After all, in these various respects, as well as in regard to precedence in rank and visits &c., no certain rules can be laid down. So much have usages, and customs, and laws varied from time to time. So very different have been the different ranks and claims of numerous sovereigns; and so many matters remain the subject of controversy.

§ 13. *As to the inviolability of ministers in different situations.* On a general principle of national law, all foreigners entering into a State, are under the protection of that law; but public ministers of all orders are peculiarly so; their persons are inviolable, from the time they enter the territory till they leave it, in all christian countries. On the *extritorial* principle, commonly, the minister, his retinue, his house, and carriages, are considered, with regard to the rights of sovereignty, as out of the territory where he resides, and as being in the state from which he is sent. All these, and his property appertaining to him *as minister*, are exempted from the civil jurisdiction of the state to which he is sent. Hence, a public minister can be cited before no tribunal, but that of the sovereign who sends him, except, 1. Where he is a subject of, or in the service of the state to which he is appointed: except, 2. Where he voluntarily submits to its jurisdiction, by suing or pleading in its courts: 3. As to any property he has, not belonging to him *as minister*: 4. Or after his mission is terminated, and he owes debts, his property is liable for them, and it is no crime against the law of nations, to seize it accordingly.

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Bynkershoek, ch. 1, p. 8; c. 2, s. 6: c. 11; Grotius, L. 2, c. 16, s. 9.—Marten's Law of Nations, 226 &c.

§ 14. *Exemptions from criminal jurisdiction.* Though a public minister commits a crime, the law of nations exempts him from punishment where he resides, for his sovereign's sake, and that his affairs there may not suffer; except, however, some crimes of a dangerous nature, and immediately against the safety of the state. In such a case he may be even put to death as an enemy; but some doubt, and such punishment is very rarely inflicted in christian countries. If he commit a private crime, the usual course is to request his recall; if against the state, he may be imprisoned till the danger is over, where it is pressing; if not so, and not unsafe, he is sent home. The same reason does not apply to his retinue. There is no great danger or inconvenience in subjecting them generally to the criminal jurisdiction.

Marten's Law of Nations, 231, 264.—Bynkershoek.

A public minister cannot pass a criminal sentence, and execute it on his servants; nor is his house an *asylum*, but for himself, his wife, and retinue; his carriages he uses, as minister, cannot be searched. His wife, in modern times, has immunities, privileges, and precedence, in like manner as her husband. But gentlemen who accompany him, but who form no part of his retinue, have no immunities or exemptions whatever, in criminal or civil cases. But his retinue includes secretaries of embassy and legation; not, however, the private secretary of the minister. His liability for imposts, seems to be uncertain; but he is clearly liable to be taxed for his real estate he occupies, and for all such movables he has not

CH. 199. as minister. So he is liable to pay all tolls on turnpikes, bridges, &c. ; and also for postage, especially, if not collected as public revenue ; for in these respects he has a *quid pro quo*. The immunities of himself, family, and retinue, cease after his mission is finished or ended, in any form, if he or they stay in the country a considerable time after his functions have ceased ; for then it may be presumed, that he, or those of his retinue who so remain, mean to be viewed as inhabitants. Further, the immunities, of the minister &c., are confined to him who sends, and to him to whom sent ; and have no relation to a third sovereign or power ; therefore, if he pass through the territories of such, he is liable in civil and criminal cases, as any other foreigner is.

Holt on Libels, p. 87, 88, *Rex v. Gordon*.

§ 15. *Libels on foreign sovereigns &c.* This was an information against Lord George Gordon, for a seditious libel in a newspaper, on the queen of France, in 1788, reflecting severely on her as the leader of a faction in France, and on others, as her insidious agents. Verdict, guilty. The court observed, that the object of the publication being to rekindle animosities between England and France, by the personal abuse of the sovereign of one of the nations, it was highly necessary to repress an offence of so dangerous a nature. A treaty of commerce had then just been concluded between the two nations.

Holt on Libels, p. 88, *Rex v. Vint*.

§ 16. *Libel on the emperor of Russia*, Paul, stating he had “ rendered himself obnoxious, by various acts of tyranny, and ridiculous in the eyes of Europe, by his inconsistency. He hath lately passed an edict, prohibiting the exportation of deals, and other naval stores. In consequence of this ill-judged law, a hundred sail of vessels are likely to return to this country without freight.” This libel was charged as having been published with the intention of traducing said emperor, and disturbing the friendship subsisting between the two nations, and to the great danger of creating discord between the king of Great Britain and the emperor Paul. Deft. was found guilty, A. D. 1801.

Holt on Libels, p. 89, 90, *Rex v. Feltier*.

§ 17. *Libel on Bonaparte*. The information stated, that before the libel was published, peace and friendship subsisted between Great Britain and the French Republic, and before, and at said times, he was, and is, first consul of the said republic, and as such, the chief magistrate of the same &c. That the deft. intending to traduce, defame, and villify him, and to bring him into hatred and contempt, as well among the liege subjects of the British king, as among the citizens of the said republic, by force and arms to deprive him of his consular office and magistracy in the said republic, and to kill and destroy him ; and also unlawfully and maliciously de-

vising, as much as in him, said Peltier, lay, to interrupt, disturb, and destroy the friendship and peace subsisting between the said lord, the king, and his subjects, and the said Napoleon Bonaparte, the French republic, and the citizens thereof; and to excite animosity, jealousy, and hatred, in the said Napoleon Bonaparte, against said king and his subjects &c. The information then stated the publication and said libel at large. The material parts, speaking of Bonaparte, were, "Oh! eternal disgrace of France! Cæsar, on the banks of the Rubicon, has against him, in his quarrel, the Senate, Pompey, and Cato; and in the plains of Pharsalia, if fortune is unequal—if you must yield to the destinies—Rome, in this reverse, at least, there remain to avenge you, a poniard among the last Romans." And in another part, speaking of Bonaparte, Peltier said, "As for me, far from envying his lot, let him name—I consent to it—his worthy successor, carried on his shield, let him be elected emperor. Finally, and Romulus recalls the thing to mind, I wish, that on the morrow, he may have his Apotheosis. Amen." Deft. was found guilty. Lord Ellenborough observed, (among other things,) that every publication, tending to interrupt the friendship between the two countries, by defaming the persons and characters of magistrates and others, in eminent situations of power and dignity in other countries, inconsistent with amity and friendship, is a libel. Referred to the cases of Gordon and Vint, above. These cases hold a stricter hand over libels than was formerly done in England, and than has been done in the United States.

ART. 11. *Ambassadors, how punishable for crimes or not.*

§ 1. Some argue the right of civil government to punish even foreign ambassadors for crimes against the divine laws of nature. But, in fact, it never has been exercised by any.

§ 2. In this case, the consul of Genoa was indicted for sending anonymous and threatening letters to the British minister, and some citizens of Philadelphia, *with a view to extort money*. Held, he was indictable in the Circuit Court of the United States; and though there was no positive statute on the subject, that the consul is not exempted. He was pardoned, on condition he give up his commission, and *exequatur*.

§ 3. "If an ambassador grossly offend, he may be sent home, and accused before his master." This exemption clearly extends to *mala prohibita*, as coining &c., but not to *mala in se*, as murder &c. It seems reasonable, if he commit a crime against the law of reason and nature, he should lose his privilege, and be punished. But the modern practice is, generally, otherwise.

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Art. 11.

2 Dal. 297,  
&c., Circuit!  
Court United  
States v. Ra-  
vara—Holt  
on Libels, p.  
86, 91.

1 Bl. Com.  
253, 254.

Marten's  
Law of Na-  
tions.

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§ 4. It was certainly much more the practice in former times, to punish foreign ministers for crimes in the countries to which sent, than at the present day, for several reasons. In modern times, much milder manners and notions prevail amongst most nations, especially of Christendom. 2. Conspiracies and crimes have become much less frequent than in more ancient times. 3. The rights of nations, and the rights and duties of these public agents, are now far better understood, than even a century past. But whether the right to punish in these cases, is exercised or not, it is still a material question, how far there is a right to punish or not, ambassadors, for crimes committed in the countries where they are received.

1 Hale's P. C.  
96, Dr. Story's case.

§ 5. 1st. It seems pretty clear, that if one of our citizens moves to a foreign country, and settles there, without the consent of his government, and then is sent ambassador from that country to this, and here received, here he may be guilty of treason, because of his former allegiance, he cannot shake off. Dr. Story had sworn allegiance to the crown of Spain, but was condemned and executed in England, his native country.

1 Hale's P. C.  
96.

§ 6. 2d. But it is also clear, that if a foreign minister, not an American citizen, be sent to the United States, and be here received, he cannot be guilty of treason; not merely because he represents a sovereign, for that was Dr. Story's case; but because he cannot owe allegiance to them; nor can he be indicted for a crime *contra legiantiae suae debitum*; though he may be treated as an enemy, and in some cases, as a felon, as if he commit murder. Hale says, that those "who are the most strict after the rights of ambassadors, yet seem to agree, that if he" *conspire the raising of a rebellion &c., and actually attempt it*, though the full effect do not ensue, "yet he may be dealt with as an enemy, and by the law of nations he may be put to death; as if he should stab or poison the prince, and yet doth not kill him; or raise an actual rebellious army.

Camden's  
Eliz. Sub.  
Anno 1571,  
Ross's case.

§ 7. 3d. But if he be guilty only of a bare conspiracy to raise a rebellion, or to change the government of the country where he resides, but his conspiracy or attempt is inconsummate, it is doubtful how far he can be punished by this country. But in the case of the bishop of Ross, it was held, by five Doctors of Law in England, he might be; for they held, he had, by "the law of nations, and by the civil law of the Romans, forfeited all the privileges of an ambassador," and was liable to punishment. He was committed to the Tower, but no criminal process issued against him as an enemy.

§ 8. *Mendoza*, the Spanish ambassador, fostered and encouraged treason in England ; but was only sent away. This also was the case of Lord L'Aubespine, the French ambassador, who conspired the queen's death. Many other cases of the kind are found in our books, in a large part of which the right to punish, in such cases, seems to have been claimed, but, in general, not exercised.

§ 9. To insult the secretary to a legation of a foreign minister, is a violation of the law of nations, and punishable by fine and imprisonment. But the offender, though convicted, and though claimed as a subject of a foreign power, cannot be given up on such claim, except in some special cases, for the public good. Nor can the convicted offender be imprisoned till the foreign sovereign offended, declares he is satisfied ; as punishments must be certain and definite, in all respects. The law of nations protects the person, house, and *comites*, of a minister ; and menacing words in his house, to his secretary, is an offence against the law of nations. Part of our law.

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Mendoza's case.—Camden's Elix. Sub. Anno 27, p. 296, L'Aubespine's case.

1 Dal. 111, 118, Resp. publica r. De Longchamps.

## CHAPTER CC.

## FELONY.

HAVING in chapters 198 and 199 considered crimes against religion and morality ; also treason, and misprision thereof, with their punishments, I now proceed to crimes of the next order, that is, *felonies*. Crimes felonious are numerous in our laws, but far less so than in most old countries, especially Great Britain.

ART. 1. *Felony*.

§ 1. *What is felony by our laws*. Some felonies are so at common law ; some are made so by statutes. This word has had various meanings. Sir Edward Coke says, that "treason itself was anciently comprised under the head of felony."

§ 2. According to Blackstone, felony, in the English law comprises every species of crimes which occasioned a forfeiture of land and goods, at common law. This most commonly happens in those crimes for which a capital punishment either is, or was, liable to be inflicted ; for those felonies which are called *clergyable*, or to which the benefit of clergy extend-

4 Bl. Com. 94, 98.

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ed, were anciently punishable with death in all lay or unlearned offenders; though now, by the statute law, that punishment is for the first offence universally remitted, all offences now capital are in the same degree. Some other offences not punishable with death are felonies, as suicide, homicide by chance-medly or self-defence, and petit larceny; these are all felonies as they subject the committers of them to forfeitures. The word is *Teutonic*, and from *fe* or *fee*, that is, the feud, and *lon*, the price or value; therefore, the price or forfeiture of the feud or feudal fee estate. The original meaning, then, was a crime, the consequence whereof was a forfeiture of all his lands or goods, or both; and in time came to be applied to the offence itself. So an offence may be punished with death, and yet be no felony; as heresy, or standing mute, neither of which works a forfeiture. In England "in all felonies which are punishable with death, the offender loses all his lands in fee simple, and also his goods and chattels. In such as are not so punishable, his goods and chattels only." By very ancient law, a bare intention to commit a felony was punishable as felony, when it missed its effect through chance or accident: 1 Haw. P. C. ch. 25, p. 65: for *voluntas reputabatur pro facto*. 3 Inst. 161. And now such intention may be severely fined. *Id.* But must not such intention be proved by some acts or attempts to commit the crime?

§ 3. *Modern felony.* "The idea of felony is indeed so generally connected with that of capital punishment, that we find it hard to separate them; and to this usage the interpretations of the law do now conform; and therefore, if a statute make a new offence felony, the law implies that it shall be punished with death, to wit, hanging, as well as with forfeiture, unless the offender prays the benefit of clergy, which all felons are entitled once to have, unless the same is expressly taken away by statute." Felony is now used to signify all capital crimes below treason.

Bul. N. P. 32.

§ 4. It is a general rule, that when a trespass is turned by statute into a felony, the trespass is merged.

1 Hal. P. C. 593.

§ 5. "Every man is bound by law to pursue a felon, and if he makes not pursuit he is finable," but not a felon. "But if A commit a felony in presence of B, and B never takes him, nor attempts it, this is not felony in B; for B had him not in his custody."

4 Bl. Com. 228.

§ 6. A statute which makes an offence a felony, gives it incidentally all the properties of a felony at common law. At common law, petit larceny was punished by whipping, and grand larceny by death.

2 Bac. Abr. 469, 470.

§ 7. Thus felony is understood generally in the English law; and Bacon says, the notions of felony as to property

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begun in the camp, in this way : anciently when men went to war, not being paid and supplied by the public, as at present, each one carried his own provisions, and it was found necessary to secure each one in the possession of his own, by very strict severe laws, or the camp had been a scene of rapine and confusion. It was, therefore, found necessary to make stealing of a shilling's worth or more, capital ; and to punish with whipping or some other infamous punishment, the stealing of less. That the citizen soldiers thought that the same law ought to be enacted at home, as in the camp in this respect ; and hence, they "learned the institution of punishing theft by death," or to make it felony ; and so "they derived it into the civil state," consisting of the same orders and conditions of men ; "for they could not understand that a freeman should be punished otherwise in the camp than in the civil state, as they thought justice was the same, and could not alter with the distinctions of countries and places ; and, therefore, it was in that, this punishment in our law differs from the Roman and Mosaic laws." Bacon adds, "hence, we have the reason of the distinction between the real and personal property, and why our law does not punish the stealing of corn or grass growing, or apples on a tree, or lead on a church or house, with death ; because these never came under the camp discipline ;" so not felony ; yet felony to steal them if severed from the freehold ; as if even the thief himself, "sever them at one time, and then come again at another time, and take them, it is felony." Bacon adds, "if a man take away a box of charters, this is not felony, because they are the muniments of the freehold, and relate to the estate at home, and not to the provisions that were used in supplying the camp abroad ;" and it seems an obligation for money came within the rule relating thus to provisions, as one might give it to another in the camp. Cites Hal. P. C. 67.

§ 8. But according to Hawkins P. C. 93, cited Hal. P. C. 66, 67 ; 3 Inst. 109 &c., "the things taken ought to be of some value in themselves, and not derive it wholly from the relation they bear to some other things, which cannot be stolen ; as paper or parchment, on which are written assurances concerning lands, or obligations, or covenants, or other securities for a debt or *choses in action* ; and the reason he says, wherefore, there can be no felony in taking away such thing, seems to be, generally speaking, they being of no manner of use to any but the owner, are not supposed to be in so much danger of being stolen, and, therefore, need not be provided for in so strict a manner as those things which are of a known price, and every body's money ; for a like reason it is no felony to take away a villain, or an infant in ward ;" and accord-

Cited 2 Bac.  
Abr. 470.

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2 Bac. Abr.  
476, cites  
Hal. P. C.

ingly are Hale, Coke, Bacon, &c. It is also from the strict discipline of the camp, the distinction is raised as to beasts *fera natura*; "for those that are for the provision of a man, when reclaimed, are within the protection of the law, and it is felony to steal them; because they answered the use of the camp for their necessary food and sustentation; but dogs, cats, bears, foxes, monkeys, ferrets, and the like, that are not used for provisions, may be stolen without any danger of death; for they are not within the inconveniency for which the law was provided; "but to steal hawks reclaimed, is felony;" for they were used in noble and generous entertainments, and were carried into the camp for diversion; and hence construed within the same provision.

§ 9. "A person who steals the goods of another, let the value of them be never so small, is guilty of felony." But to constitute stealing, there must be certain property, manner of taking, and carrying away, and with a certain intention, which will be considered under the the head of larceny.

§ 18. I have been thus particular in regard to the taking or stealing property in England, being felony or not, in order to see whence the idea of felony in the English law has arisen in cases of theft; and it will be observed, they have arisen principally from three sources: 1. Forfeiture of estate, or a crime punished with this forfeiture: 2. Death, or a crime punished with death: 3. This camp spirit and discipline. In addition to these vague and numerous sources and grounds of felony in England, in taking another's property, there may be added hundreds of statutes in that country, passed from time to time, in the last six centuries, making hundreds of minute distinctions in regard to felonies; and for various reasons existing in that country, from time to time, which never existed in this country. The forfeiture of estate has never been annexed to stealing, or to any crime in this country, at least in Massachusetts, except for treason; for very early there was a Colony law providing there should be no forfeiture for death judicial &c. See Ch. 3, a. 2. And not one-thirtieth part of the capital felonies in England have been punished with death in the United States, at least in New England; and as to this notion of camp discipline, it never has had the least foundation in this country; yet in our indictments for stealing, and many other crimes, we servilely imitate the English forms, in the use of the word *felonious* or *feloniously*. If a person here steal a pound of butter, we allege in the indictment, he feloniously steals it, though attended with no forfeiture of estate, no capital punishment, and no camp discipline. Another proof how, by a sort of habit of imitation we use words after the reasons of their use have wholly ceased. And we view stealing any

personal property here of value, as a felony, though not one of the principal reasons exist for so viewing it formerly in England. But what is properly felony in the United States, and especially in this State, will best be considered, as each crime shall be treated of in the following chapters.

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§ 11. Even the law of Congress respecting the punishments of crimes, the word *felony* or *feloniously* is used very vaguely. For instance, section 6, if any person conceal "wilful murder or other felony," is to be adjudged "guilty of misprision of felony," and imprisoned and fined. 16th section forbids and punishes larceny, but the word *felony* or *feloniously* is not used in this section; but section 17 punishes receiving goods "feloniously taken or stolen."

Sir Edward Coke says, the word "*felony, ex vi termini significat quodlibet crimen felleo animo perpetratum;*" and "*felonies* can be expressed by no other word." Anciently, pardon of felonies extended to high treason; but the law is now otherwise; but all petty treasons, murders, &c. are pardoned thereby. A man forfeits all his lands in fee, and his goods and chattels, for such felonies for which he shall have judgment to be hanged; but he shall forfeit his goods and chattels only for felony by chance-medley, *se defendendo*, or petit larceny." "Piracy, though it be a felony, was only punishable by the civil law, before 28 H. VIII. c. 15; and an attainder thereof by the course of the civil law, does not corrupt the blood, but an attainder by force of that statute does. A pardon of all felonies does not discharge piracy, because it was a felony whereof the common law took no consuance."

Co. Lit. 391,

§ 12. The fact is, the word *felony*, in the process of many centuries, has derived so many meanings from so many parts of the common law, and so many statutes in England, and has got to be used in such a vast number of different senses, that it is now impossible to know precisely in what sense we are to understand this word. Coke tells us, *piracy is felony*, yet of that singular sort, that a pardon of all felonies does not pardon piracy. Blackstone tells us, that felony and a crime punished with forfeiture of estate, or with death, are nearly synonymous; yet we have many felonies, not one punished with forfeiture of estate, and but a very few with death, and but one formerly a felony, so punished.

§ 13. The indictment charged that the defts., being evil disposed persons, and contriving to injure Thomas Pons, and get his property from him by false pretences, without paying for it &c., at —, on —, with force and arms, did frudulently and unlawfully conspire, combine, &c. to obtain possession of ten sets of carriage harness of said Pons, of the

5 Mass. R.  
106, Commonwealth v.  
Kingsbury  
and others.

CH. 200. value of &c., in his shop &c., under colour of authority from him to two of the defts. to sell the same, and carry them away, &c.; and that in pursuance of this conspiracy, they got possession, and carried them away, with the intent to defraud Pons of the value &c. One deft. was arraigned, and found guilty on *not guilty* pleaded. Motion in arrest of judgment, because the offence charged amounted to a larceny, which being a *felony*, this conspiracy charged is merged; and so was the opinion of the court. And the court held, "the fraudulently obtaining of possession of the chattels of Pons, carrying them away, and secreting them, is unquestionably a felony;" and that the *conspiracy before* executed, was a misdemeanour by itself, and as such then indictable, but *after* executed or effected, it merged in the felony; for the contrivance, when executed, is a part of the felony. The law is the same as to misdemeanours. "An intent to commit a misdemeanour, manifested by some overt act, is a misdemeanour; but if the intent be carried into execution, the offender can be punished but for one offence." Had the jury acquitted the deft. of *executing* the conspiracy, and convicted him of that only, he might have had sentence for the misdemeanour, as the offence was not laid to be done *feloniously*; but they found him guilty of acts amounting to felony.

7 Mass. M.  
243, Commonwealth v.  
Newell and  
five others.

§ 14. The court, in this case, held, that a number of men entering a dwelling house with intent to cut off an ear of an inhabitant, was not a felony. The defts. were indicted for *feloniously* and *burglariously* breaking and entering Dixon's house, in Boston, in the night &c. with intent unlawfully and *feloniously* to assault Dixon, and to cut off one of his ears, and maim him &c.; that they did cut off his right ear *of malice aforethought* &c. Prisoners demurred to this indictment, on the ground the crime charged did not amount to a felony; to cut off an ear is not a felony, or *mayhem*. *Curia*:—Breaking and entering a dwelling house in the night, is no burglary, unless with an intent to commit a *felony*. No felony to cut off an ear "of set purpose, and of malice aforethought, with the intention to maim and disfigure," by the common law; nor by Massachusetts statute of 1804, c. 123. *Mayhem* at common law was a specific offence, punished *with forfeiture*, and so a *felony*. Member for member was an ancient barbarous custom, long since disused, and the punishment has long been fine and imprisonment, as in cases of *trespasses*. Our ancestors, coming to America, never deemed *mayhem* a felony, but only an aggravated trespass at common law, or a misdemeanour; and no statute in the Colony or Province held it otherwise; nor has said act of 1804; it uses the word *maim* in a "popular sense of *mutilating*, and not as synonymous with the techni-

cal word *mayhem*." The cutting off the ear is not called a maim, but is created an offence, and is punishable as a *misde-meanour*. CH. 200.  
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It will be observed, that in both these cases, the Attorney General mistook the law as to felony; in the first, he omitted to lay the offence *feloniously*, when he should have done it; in the second, laid it *feloniously*, when it should not have been laid *feloniously*.

ART. 2. *Coins, or public currency.*

§ 1. Counterfeiting or debasing these, is rather a mixed offence, in some measure against the state, also against public justice; as hardly any crime tends more to obstruct it. This currency may be considered under two heads: What is the legal currency; What are the crimes, and how punished, in counterfeiting or debasing it. This is a subject of great extent, and it would require a volume to treat of it at large; I shall confine myself merely to general principles. America, for three centuries, has nearly supplied the world with the precious metals. In England, the king regulates the coin; but in the United States, it has been regulated by the legislatures and Congress; since March 4, 1789, by Congress only.

§ 2. By this constitution, Congress has power "to coin money, and to provide for the punishment of counterfeiting the securities and current coin of the United States." Cons. U. S.  
art. 1, sect. 8.

§ 3. By this act, our gold coin is eleven parts fine, and one part alloy, and passes 270 grains, standard gold, for ten dollars; and the silver coin passes 416 grains, standard silver, to a dollar, and, by an act of Congress, passed in 1795, is nine parts fine or pure silver, and one part alloy; and the copper coin passes at eleven pennyweights to a cent, by said act of April, 1792. And by this act, it is also enacted, that if any officers or persons employed in the mint, shall debase the coin established &c. by making it worse &c, they shall suffer death. Act of Cong.  
April 2, 1792.

§ 4. By section 1, of this act, the gold coins of Great Britain and Portugal pass at one hundred cents for twenty-seven grains of their standard or actual weight; and the gold coins of France, Spain, and dominions of Spain, at one hundred cents for twenty-seven grains and two-fifths of a grain. Thus a very exact standard of money has been established in the United States, after much inquiry for ten years, as to this standard, in which all the coins, nearly, of Europe and America were critically examined and weighed, in order to ascertain their true average weight and fineness. For the value of foreign coins or monies in our customhouse in paying duties, see Tenders of money and our money of account; see Ch. 170, a. 5; so the effect of a payment in counterfeit money, see same chapter and article. Act of Cong.  
Feb. 9, 1793.

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Art. 3.



§ 5. The money of account throughout the United States, is now, and long has been, the dollar, cent, and mill. In the Colonies, Provinces, and for some years after 1775, there were various kinds of monies, specie and paper, of different values, weights, and alloy, material in a *moral and political* view, but of no importance now in a *legal* view. (Laws as to coins in England; see East's C. L. 141 to 198.)

4 Bl. Com.  
99.

§ 6. To utter false or counterfeit money was only a misdemeanour at common law. See Smith's case, post.

ART. 3. *Debasing the coins &c.*

Act of Cong.  
April 2, 1792.

§ 1. By section 19, this act, it is enacted, "that if any of the gold or silver coins, which shall be struck or coined at the said mint, shall be debased or made worse, as to the proportion of fine gold or fine silver therein contained, or shall be of less weight or value than the same ought to be, pursuant to the directions of this act, through the default, or with the connivance of any of the officers or persons who shall be employed at the said mint, for the purpose of profit or gain, or otherwise with a fraudulent intent, and if any of the said officers or persons shall embezzle any of the metals, which shall at any time be committed to their charge, for the purpose of being coined, or of any of the coins which shall be struck or coined at the said mint, every such officer or person who shall commit any, or either of the said offences, shall be deemed guilty of *felony*, and shall suffer death."

Act of Cong.  
May 8, 1792.

§ 2. By this act, a copper coinage is provided, for cents and half cents; and forbids all other copper coins to be paid or received in payment, or to pass current as money; and all others, paid or received, to be forfeited; "and every person by whom any of them shall have been so paid, or offered to be paid or received in payment, shall also forfeit the sum of ten dollars, and the said forfeiture and penalty shall, and may, be recovered, with costs of suit, for the benefit of any person or persons by whom information of the incurring thereof shall have been given."

Act of Cong.  
Jan. 14, 1793.

§ 3. This act provides, "that every cent shall contain 208 grains of copper, and every half cent 104 grains of copper."

Act of Congress that provides for the punishment of counterfeiting current coin of the United States; see post. There are now no current coins, coined by the several States, but many bank bills, issued under their authority respectively, which are often counterfeited or altered; and all counterfeittings, debasings, and alterings of coins current in any State, or bank bills so current, are punished by State laws passed in each State.

Cir. Court,  
Boston, June,  
1792, *United States v. Smith* and three others.

§ 4. In these cases, there were four indictments at common

law against the defts., for counterfeiting bank bills of the Bank of the United States; passing them and having tools to counterfeit &c. Smith was found guilty of passing bank bills of the said bank, counterfeited. Parsons moved in arrest of judgment, because there was no Federal statute on the subject; hence only an offence at common law; and the State courts exclusively have jurisdiction of these offences. The court held, the act incorporating the bank of the United States was a constitutional act, and that by the constitution of the United States, the Federal courts had jurisdiction of all causes or cases in law and equity, arising under the said constitution and the laws of the United States; that this was a case arising under those laws, for those bills were made in virtue thereof, though there was no statute describing or punishing the offence of counterfeiting them; and therefore, to counterfeit them was a *contempt of, and misdemeanour against the United States*, and punishable by them as such; and that the same offence might be punished as a *common law cheat* in the State court. Judgment was, fine, and imprisonment, and pillory, the common law punishment; but not to pay costs, paying costs being no part of the common law punishment. See 7th amendment of the Federal constitution as to common law.

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According to this case, the United States courts may punish counterfeiting, or debasing the coins of the United States, though there be not any express statute for the purpose. And so may the State courts.

§ 5. This act provides, (among many other things,) that if any person "shall forge or counterfeit any silver or gold money, or coin, that is or shall be current in this Commonwealth," he shall be fined, set in the pillory, have an ear cut off, set on the gallows, be whipped, and sentenced to hard labour, not above seven years. Sect. 2,—If any person "shall colour, gild, or case over with gold or silver, or with any wash or material producing a colour resembling that of gold or silver, any coin resembling any money or coin," which is or shall be current in this Commonwealth, or any pieces of coarse gold, or coarse silver, or other metals, with intent it shall be coined into counterfeit money or coin in the Commonwealth, as aforesaid, or into pieces resembling the gold coin, established or current in this Commonwealth, as aforesaid; or that shall wash, gild, or colour any lawful or counterfeit silver coin, with intent to make such silver coin resemble any gold coin established or current in this Commonwealth, as aforesaid; or that shall wash, gild, or colour, or any ways alter, any copper coin, with an intent to make it resemble either the silver or gold coin, the currency of which is or shall be established, and regulated by law, or which is or

Mass. Act,  
July 4, 1786,  
revised, in  
substance,  
March 15,  
1805.

CH. 200. shall be current in this Commonwealth, being convicted thereof, such person shall be adjudged guilty of forging and counterfeiting the money or coin established or current in this Commonwealth ;" and be punished as above.

Art. 3. § 6. This act, also, punishing the uttering any such false money or coin, current &c., knowing the same to be false, forged, and counterfeit,—like punishment. Also punishes the bringing into this Commonwealth, or having in possession any such false &c. money or coin, with intent to pass it, knowing it to be false &c.,—like punishment. Also punishes any person knowingly making or mending any tool for counterfeiting gold or silver money, current &c., with intent or expectation it be used &c.,—like punishment. So punishes persons in possession of such tools, knowingly, with intent &c. Punishes also counterfeiting copper coin ; bringing it in &c. ; rewards to informers &c.,—all, or any of the above punishments. Repeals all other acts "against clipping, diminishing, or counterfeiting, any coined money established by law, or current in this Commonwealth.

§ 7. This act extends to the coins and monies of the United States, and to all other coins and monies, in fact, current in this Commonwealth ; and it is understood the several States, generally, have laws like this.

§ 8. The same statute of Massachusetts of March 15 1805, "against forgery and counterfeiting," generally, punishes the counterfeiting of bank bills, (among other things,) also the passing them, knowing them to be counterfeited, issued from any bank in the United States. See that statute, generally, below.

Act of Congress, April 21, 1806.

§ 9. This act provides, sect. 1, "if any person shall falsely make, forge, or counterfeit, or cause or procure to be falsely made, forged, or counterfeited, or willingly aid or assist in falsely making, forging, or counterfeiting any gold or silver coins," coined at the United States mint, or any foreign gold or silver coins, current by law, or used in the United States ; or "utter as true, any false, forged, or counterfeited coins of gold or silver, as aforesaid, for the payment of money, with intent to defraud any person or persons, knowing the same to be falsely made, forged, or counterfeited," shall be deemed guilty of felony,—and punishment, imprisonment and hard labour, not less than three, nor more than ten years ; or imprisoned, not above five years and fined, not exceeding \$5000. Sect. 2 punishes as a felony, on like principles, importing false or counterfeited gold or silver coins into the United States, or uttering them as true. Sect. 3 punishes as a high misdemeanor, and by fine and imprisonment, debasing or diminishing them.

**ART. 4. Bank bills.**

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*Art. 4.*

§ 1. Since 1792, bank bills, or notes issued by banks in corporations, signed by their presidents and countersigned by their cashiers, payable to A. B. or bearer, on demand, generally, have principally formed the circulating medium, or current money of the United States. Very great sums, in these bills, have been constantly kept in circulation, principally by the numerous State banks incorporated by the several State legislatures.

§ 2. By this act the bank of the United States was established, consisting of a capital of ten millions of dollars; two subscribed by the United States, (cash,) and eight by individuals; two specie, and six public stock. June 27, 1798, an act of Congress was passed, to punish counterfeiting the bills &c., incorrectly worded, and hence repealed by the next act. *United States v. Cantril; same v. Baylies.*

Act of Congress, Feb. 25, 1791.—  
4 Crach, 167,  
168.

By this act it was enacted, "if any person shall falsely make, forge, or counterfeit, or cause, or procure to be falsely made, forged, or counterfeited, or willingly aid or assist, in falsely making, forging, or counterfeiting, any bill or note, in imitation of, or purporting to be a bill or note issued by order of the president, directors, and company of the bank of the United States, or any order or check on the said bank or corporation, or any cashier thereof; or shall falsely alter, or shall cause, or procure to be falsely altered, or willingly aid or assist in falsely altering any bill or note, issued by order of the president, directors, and company of the bank of the United States, or any order or check on the said bank or corporation, or any cashier thereof; or shall pass, utter, or publish, or attempt to pass, utter, or publish, as true, any false, forged, or counterfeit bill or note, purporting to be a bill or note issued by order of the president, directors, and company of the bank of the United States, or any false, forged, or counterfeited order or check upon the said bank or corporation, or any cashier thereof, knowing the same to be false, forged, or counterfeited; or shall pass, alter, or publish, or attempt to pass, alter, or publish, as true, any falsely altered bill or note, issued by order of the president, directors, and company of the bank of the United States, or any falsely altered order or check, on said bank or corporation, or any cashier thereof, knowing the same to be falsely altered, with intention to defraud the said corporation, or any other body politic, or person; every such person shall be deemed and adjudged guilty of felony; and being thereof convicted, by due course of law, shall be sentenced to be imprisoned, and kept to hard labour," not under three, nor above ten years; or imprisonment, not above ten years, and fined, not above

Act of Congress, Feb. 24, 1807.

CII. 200. §5000; "provided, that nothing herein contained shall be construed to deprive the courts of the individual States of a jurisdiction, under the laws of the several States, over the offence declared punishable by this act.

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§ 3. A similar provision for punishing the *counterfeiting* bank bills, or *aiding* in counterfeiting them, or any order or check; or *falsely altering* them, or causing them to be falsely altered, or *aiding* therein; or *passing*, or *attempting* to pass, as true, any *counterfeit* bill or note, purporting to be &c., or any *counterfeit* order or check, *knowing* it to be counterfeit; or *pass*, or *attempt* to pass, as true, any *falsely altered* bill, note, order, or check, knowing it to be falsely altered, with intention to defraud &c., has been made, in many cases, in the laws of the several States, public and private: but all, generally, on the same principles, and nearly in the same words.

2 Mass. R.  
77, Commonwealth v.  
Boynton.

§ 4. Deft. was indicted for uttering, as true, a certain bill, counterfeited to the likeness of a bill issued by order of the president &c. of the New Hampshire bank, established by law &c., signed by the president, and countersigned by the cashier—Peabody. The jury found this name not the name of any person ever cashier of that bank; so a fictitious name, so not within Massachusetts act of March 6, 1801; for, by that, the bill must purport to be countersigned by a real cashier.

2 Mass. R.  
128, Commonwealth v.  
Morse.

§ 5. Held, the possession of materials, devised, adapted, and designed for counterfeiting bank notes, *without* an intent to use them in counterfeiting, is not an offence within Massachusetts act of March 15, 1805. This act is, *with an intent to use* &c. The same in forging bills &c.

2 Mass. R.  
338, Commonwealth v.  
Morse.

§ 6. So not an offence within said act, to possess forged bills, purporting to be bills of the bank of A. no such bank, in fact, existing, with intent to pass them as genuine bills; for the act only respects a bank established by law in this, or in any of the United States.

2 Mass. R.  
373, Commonwealth v.  
Ross.

§ 7. Indictment for uttering a forged promissory note, need not state the date of the note, nor the time when the money was made payable.

11 Mass. R.  
136, Commonwealth v.  
Hill.

§ 8. The court held, that procuring a counterfeit bank note to be passed by an ignorant boy, as a true one, was a sufficient passing within the statute of 1804, c. 120, s. 3, *that knowing it to be counterfeit, intending* &c. Deft. agreed to give the boy half of the bill for passing it.

1 Doug. 300,  
Rex v. Jones.

§ 9. Deft. was indicted for uttering a bank note; held, the word, *purporting* to be a bank note, mean, that the note, upon the face of it, appears to be a bank note, and the want of such appearance cannot be supplied, so as to support an indictment, by any representations of the party, when he dis-posed of it.

§ 10. It is death and confiscation to counterfeit, or adulterate, the gold or silver coins of France, there current, or to be concerned in uttering, or importing such. This is a very severe law, for modern times. Art. 139 is the same law, as to public securities and bank notes, and state seals.

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Art. 5.

Penal Code,  
art. 132 &c.

ART. 5. *Embezzling public stores.*

§ 1. This act provides, that "if any person or persons, having at any time hereafter the charge or custody of any arms, ordnance, munition, shot, powder, or habiliments of war, belonging to the United States; or of any victuals provided for the victualling of any soldiers, marines, or pioneers, shall for any lucre or gain, or wittingly, advisedly, and of purpose to hinder or impede the service of the United States, embezzle, purloin, or convey away, any of the said arms, ordnance, munition, shot or powder, habiliments of war, or victuals, that then, and in every of the cases aforesaid, the person or persons so offending, their counsellors, aiders and abettors (knowing of, and privy to, the offence aforesaid) shall, on conviction, be fined, not exceeding the fourfold value of the property so stolen, embezzled, or purloined," a moiety to the United States, and a moiety to the informer and prosecutor, and be publicly whipped, not exceeding thirty-nine stripes. By the French law, hard labour generally.

Act of Congress, April, 30, 1790, sec. 16.

P. Code, art. 169 to 173.

2. This offence of embezzling public stores in England, is made a felony by 31 El. c. 4; but the above act of Congress has not declared this offence felony. So embezzling public stores of any kind in the army, is severely punished by the 36th article of war, as forfeiture of the amount embezzled, loss of pay, and dismission from the public service.

4 Bl. Com. 101—Act of Cong. Apr. 10, 1806.

ART. 6. *Serving foreign states, and cruising against a friendly nation.*

§ 1. Section 1 of this act provides, "that if any citizen of the United States shall, *within* the territory or jurisdiction of the same, accept or exercise a commission to serve a foreign prince or state in war, by land or sea, the person so offending, shall be guilty of a high misdemeanour, and shall be fined, not more than \$2000, and shall be imprisoned, not exceeding three years."

Act of Cong. June 5, 1794.  
—Made perpetual April 24, 1800.

§ 2. Section 2 also makes it a high misdemeanour for any within the United States, "to enlist or enter himself, or hire or retain another person to enlist, or enter himself, or to go beyond the limits or jurisdiction of the United States, with intent to be enlisted or entered in the service of any foreign prince or state, as a soldier, or as a marine, or seaman on board of any vessel of war, letter of marque, or privateer." But this section extends not to a foreigner transiently in the United States. This section also exempts those who in thirty

Ca. 200. days discover the person or persons by whom he was so enlisted &c., so that such person or persons be convicted of the said offence.

Art. 6.

§ 3. Section 3 makes it a high misdemeanour to fit out ships of war, or to issue commissions for persons to serve one foreign state against another at peace with the United States. Punishment, fine and imprisonment, and forfeiture of the vessel of war, and of all implements, arms, provisions, &c.

§ 4. Section 4 makes it a misdemeanour to increase any such force in the United States, for such purposes.

§ 5. Section 5 makes it a high misdemeanour to set on foot in the United States, any military expedition against a nation at peace with the United States.

§ 6. Section 6 empowers the District Courts to take cognizance of "captures made within the waters of the United States, or within a marine league of the coasts or shores thereof."

§ 7. Section 7 provided, that "in every case in which a vessel shall be fitted out, or armed, or attempted to be fitted out or armed, or in which the force of any vessel of war, cruiser, or other armed vessel shall be increased or augmented, or in which any military expedition or enterprise shall be begun or set on foot, contrary to the prohibitions or provisions of this act; and in every case of the capture of a ship or vessel within the jurisdiction or protection of the United States, as above defined, and in every case in which any process issuing out of any court of the United States, shall be disobeyed or resisted by any person or persons having the custody of any vessel of war, cruiser, or other armed vessel of any foreign prince or state, or of the subjects or citizens of such prince or state." The president, or such person as he may empower for the purpose, may employ "such part of the land or naval forces of the United States, or of the militia thereof, as shall be judged necessary, for the purpose of taking possession of, and detaining any such ship or vessel, with her prize or prizes, if any, in order to the execution of the prohibitions and penalty of the act, and to the restoration of such prize or prizes, in the cases in which restoration shall have been adjudged, and also for the purpose of preventing the carrying on of any such expedition or enterprise from the territories of the United States, against the territories or dominions of any foreign prince or state with whom the United States are at peace." Also by section 8, to employ such force "to compel any foreign ship or vessel to depart the United States, in all cases in which by the laws of nations or the treaties of the United States, they ought not to remain within the United States." Section 9 provides, nothing in this act shall prevent

the prosecution of treason or any piracy defined by a treaty or other law of the United States. CH. 200.  
Art. 7.

§ 8. This act was passed in the commencement of the French revolution, when attempts were made in the United States, to engage their citizens in enterprizes against the enemies of France.

June 14, 1797. This act of Congress was passed to prevent citizens of the United States from privateering against nations in amity with, or against citizens of, the United States; and principally from fitting out armed vessels for such purposes *without* the limits of the United States; and from being concerned in such; the crime a high misdemeanour, to be tried where the offender is brought in or apprehended; fine, not exceeding \$10,000, and ten years' imprisonment.

**ART. 7. Desertion.**

§ 1. By this article of the constitution of the United States, Congress has power "to make rules for the government and regulation of the land and naval force; and no state, without the consent of Congress, shall keep troops or ships of war in time of peace." Constitution  
of the United  
States, art. 1,  
sec. 8, sec. 10.

§ 2. September 1776, the old Congress established articles of war. Section 6, article 1, enacted, that every officer or soldier, who having received pay, or having been duly enlisted in the service of the United States, shall be convicted of having deserted the same, shall suffer death or such punishment as by a court martial shall be awarded. And article 2, if any non-commissioned officer or soldier absent himself from his troop, or company, or from any detachment, with which he shall be commanded, he shall, upon being convicted thereof, be punished according to the nature of his offence, at the discretion of a court martial. Article 3, no non-commissioned officer or soldier shall enlist himself in any other regiment, troop, or company, without a regular discharge from the regiment, troop, or company, in which he last served, on the penalty of being reputed a deserter, and suffering accordingly," and any officer knowingly receiving or retaining him, is liable to be cashiered. By the articles of war, especially of April 10, 1806, article 7 &c. mutiny or sedition in the army is punished as desertion is. Journals of  
the Old  
Congress,  
Sept. 20, 1776.  
—Act of  
Cong. Apr.  
10, 1806, art.  
20, 22, 23.

By the articles of Confederation, Congress had the same power over the land and naval forces of the United States, as above under the Federal constitution.

§ 3. This act provided, that "any non-commissioned officer or soldier who shall desert, or without leave from his commanding officer, absent himself from the troop or company to which he belongs, or from any detachment of the same, shall, upon conviction thereof, suffer death, or such other punish- Mass. act,  
Oct. 24, 1786,  
art. 8.

CH. 200. ment as shall be inflicted by the sentence of a general court  
 Art. 7. martial."

Act of Cong. 1796. § 4. By the act of Congress passed under the new constitution, the articles of war above of September 20, 1776, were adopted for governing the United States army.

§ 5. Our articles of war have ever been nearly the same, and because originally copied nearly from the British articles of war, to which we had been accustomed, and which in more ancient times had been revised till they were brought to quite a perfect state, on the principles on which they were founded. By these articles, and by several ancient acts of parliament, especially by 2 and 3 Ed. VI. c. 2, desertion is punished with death; and the same ancient statutes punish other inferior offences with fines, imprisonment, and other penalties.

Act of Cong. Apr. 23, 1800. So desertion in the navy to an enemy, is capitally punished, and other desertions are punished as in the army.

Circuit Court, Boston, June, 1799. United States v. Fairbanks. He was indicted on the Federal sedition act passed July 14, 1798, for erecting a liberty pole in Dedham &c., and was found guilty on his plea of not guilty, and fined \$5, and imprisoned six hours. This act expired March 3, 1801. See more of this act, Chase's case, Ch. 222.

Rob. R. 252. War, to which these articles principally relate, is a conflict  
 Brook's Abr. between nations which can exist but by the authority of the  
 Tit. Denizen, sovereign power in the United States, and but by the declaration  
 pl. 20.—Bos. of war made by their legislature. But hostilities may  
 & P. 163. be commenced in modern times, without a declaration of war  
 made to the enemy; not so formerly. It is still usual for a  
 nation to publish such declaration throughout its own dominion.  
 In England only the king can make war; not all the people can  
 make it. Who is a hostile alien; see Ch. 3, a. 2; Ch. 40; Ch. 131.

*Smuggling.* This is a mere statute offence, and in the United States must be created, defined, and punished by acts of Congress. (Is death in England by 19 Geo. II, c. 34.)

Act of Cong. March, 2, 1799. By this act to "regulate the collection of duties on imposts and tonnage," many penalties are inflicted for unloading &c. goods in sundry cases contrary to this act. Section 27 enacts, "that if after the arrival of any ship or vessel so laden with goods as aforesaid, and bound to the United States, within the limits of any of the districts of the United States, or within four leagues of the coasts thereof, any part of the cargo of such ship or vessel shall be unladen for any purpose whatever from out of such ship or vessel as aforesaid, before such ship or vessel shall come to the proper place for the discharge of her cargo, or some part thereof, and shall be there duly authorized by the proper officer or officers of the customs, to un-

CH. 201.

Art. 1.

lade the same, the master or other person having the charge or command of such ship or vessel, and the mate or other person next in command, shall respectively forfeit and pay the sum of one thousand dollars for each such offence, and the goods, wares, and merchandises so unladen and unshipped, shall be forfeited and lost, except in the case of some unavoidable accident, necessity, or distress of weather." Section 28 enacts, "that if any goods, wares, and merchandise, so unladen from on board of any such ship or vessel, shall be put or received into any ship, vessel, or boat, except in case of such accident, necessity, or distress as aforesaid, to be notified and proved as aforesaid, the said master or other person having the charge or command of such ship, vessel, or boat into which the said goods, wares, and merchandise shall be so put and received, and every other person aiding and assisting therein, shall forfeit and pay treble the value of the said goods, wares, and merchandise, and the ship, boat, or vessel in which they shall be so put, shall be forfeited and lost."

These two clauses shew the general spirit of these laws against smuggling. The offence usually is in an attempt to run goods without paying the duties imposed by law; and the punishment usually is a fine, and a forfeiture of the goods, and of the vessel, boat, &c.

This offence is considered by Blackstone as an offence against trade; but as it also tends to destroy the public revenue, it is properly enough viewed as an offence against the state.

By act of Congress March 26, 1804, section 3, crimes arising under the revenue laws, must be prosecuted within five years after committed.

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## CHAPTER CCI.

### CRIMES AGAINST PUBLIC POLICY &c.

#### ART. 1. *General principles.*

Having, in the four preceding chapters, considered the nature of crimes and punishments generally; also more particularly crimes &c. in regard to *principals* and *accessaries*; also crimes &c. against religion and morality; also high crimes, as treason &c., and several high offences against the state;

Сн. 201. and felony, generally ; we now come to a great number of  
 Art. 1. offences, mostly *misdemeanors*, and against the *public polity*  
 and good order of the government. They are often classed,  
 by commentators on law, as being,

§ 1. *Against public justice*,—as interrupting the administration of it. Such as obstructing the arrest of offenders ; rescuing them ; aiding their escapes ; by breach of prison &c. Such as destroying public records ; gaolers by duress, making their prisoners approve others. Such as barrettry, bribery, champerty, extortion, maintenance, oppression, and embracery : such as compounding informations, false verdicts, conspiracies, and perjury : such as rewards taken for restoring stolen goods, receiving them, knowing them to be stolen ; and compounding with the thieves : such as delinquencies, and corruptions in elections.

§ 2. *Offences against the public peace*. Such as forcible entries, going and riding armed, to the terror of the people ; spreading false news, affrays, sending menacing letters, and challenging to fight. Such as riots, routs, and unlawful assemblies, and libels.

§ 3. *Offences against public trade* : such as cheatings and frauds, dishonest bankruptcies, monopolies, and usury : such as forestalling, engrossing, and regrating : such as exercising trades forbidden by law ; and such as are in violation of numerous statutes, enacted to produce honest and fair dealings in various trades and occupations ; and as to weights and measures.

§ 4. *Offences against public police, economy, and health* : such as selling unwholesome provisions, violating the laws as to quarantine ; such as nuisances in roads &c., offensive trades, disorderly inns, retailers' shops, and gaming houses : such as stage-plays, rope-dancing, &c. ;—such as gaming, lotteries, fireworks, squibs, and bonfires : such as eaves-droppings, idleness, and luxury ;—such as violations of laws made to prevent the spreading of sickness ; laws to preserve fish ; laws to promote schooling, &c.

As these numerous offences are generally misdemeanors, and any one of them is rarely connected with others of them, they may be naturally enough considered in an *alphabetical* order, generally in the following articles, or heads, to wit : affrays ; approving, one forced thereto by gaolers ; arsenals ; bankruptcies, fraudulent ; barrettry ; bonfires, fireworks, &c. ; bribery ; challenging to fight ; champerty ; cheatings, frauds, and deceits ; compounding informations ; conspiracies ; elections ; embracery ; engrossing ; escapes ; extortion ; forcible entries ; forestalling ; gaming, and gaming-houses ; going or riding armed, *in terrorem* ; idleness ; inns, and retailers' shops,

disorderly ; libels ; lotteries ; menacing letters, sent &c. ; CH. 201.  
 maintenance ; monopolies ; nuisances, as in roads ; offensive Art. 3.  
 trades ; eaves-droppers ; fish acts &c. ; obstructing process ;  
 perjury, &c. ; prison-breaking ; quarantine ; records, des-  
 troying ; regrating ; riots, &c. ; rope-dancing, stage-plays, &c. ;  
 schools ; shoemakers, not to be curriers &c. ; slave-trade ;  
 vagabonds, &c. ; unwholesome provisions ; usury ; weights and  
 measures.

§ 5. These various offences, or misdemeanors, when committed, are viewed as in a peculiar manner committed against the public order and regular government ; for though some of them are hurtful to individuals, yet they are inconsiderably so, compared with those direct attacks on their persons and property, usually denominated *crimes against individuals*, as burning their house, stealing their goods, assaulting their persons, taking away their lives &c., which will be considered as another class of crimes and offences.

§ 6. Though the various offences above stated are not so destructive of civil society, as some others, yet they are such as no well-governed state can suffer to exist unpunished. Many of them are offences, when committed, which often lead to the most atrocious crimes ; frauds often lead to forgeries ; gaming, to suicide ; obstructing process, to treason against the state, &c.

ART. 2. *Affrays*. Affray to terrify, is the fighting of two or more persons in some *public* place, to the terror of the people ; for if the fighting be in private, it is no affray, but only an assault ; and affrays may be suppressed by any persons present, who may justify their endeavouring to part the combatants, whatever consequences may follow ; but more especially, the constable, or other peace officer, may break open doors to suppress the affray, or to apprehend the affrayers ; and may either carry them before a justice of the peace, or imprison them, by his own authority, for a convenient time, till the heat is over. The punishment is fine and imprisonment. The second blow, it is said, makes the affray. 1 Hale's P. C. 456. And see Arrests, and Breaking open doors.

1 Haw. P. C.  
 134.—4 Bl.  
 Com. 145,  
 Indictment  
 for, 1 Burn,  
 21.

By art. of war, 27, all officers have power to part “ and quell all quarrels, frays, and disorders, to whatever regiment &c. the offenders belong ; and to order officers into arrest, and non-commissioned officers or soldiers into confinement, until their proper superior officers be informed &c. ; and who-ever refuses to obey such officer, is punished” &c.

Act of Con-  
 gress, April  
 10, 1816.

ART. 3. *Approvement, by gaolers &c.* Though it has ever been a practice in most governments, to induce one offender to accuse and bring out his companions in guilt, under some

3 Inst. 91.—  
 4 Bl. Com.  
 129 ; con-  
 sidered

M'Nally, 127, 130, not allowed in any case, in Ken. act, Feb. 26, 1799, s. 45.

CH. 201.

Art. 4.



promises of favour, (Ch. 193, a. 35,) yet it has ever been deemed a crime, in all well-governed states, for gaolers and others, having the legal custody of criminals, to force an offender, by duress of imprisonment, to do this. In the time of E. III. this offence was so common, that Parliament found it necessary to pass the act, 14 E. III. c. 10, enacting, that if any gaoler, by too great duress of imprisonment, made any prisoner in his custody become an *approver* or an *appellor*, against his will, that is, to accuse or turn evidence against some other person, it was felony in the gaoler. In the United States, where there is no express statute on the subject, this offence is a misdemeanor, and punishable by fine and imprisonment &c. There was much ancient learning as to approvement, which see 2 Hale's P. C. 225 to 233; but it is now nearly out of use even in England. And Hale justly observes, that more mischief came to good men by these kinds of approvements, by false accusations of desperate villains, than benefit to the public, by the discovery and conviction of real offenders; and when they were allowed, it was with great caution and strictness, and only in capital cases, as of treason or felony, at common law or by statute; and the approvement was allowed only as to those guilty of the same crime with the approver, so as to hold them to answer. And on these, and various other points, growing out of the doctrine of approvement, many very nice distinctions are found to have been made in the old books, and in the ancient proceedings in England.

Act of Congress, May 7, 1800, s. 2, 3.  
—See Federal districts.

ART. 4. *Arsenals.* By this act of Congress, if any person entice &c. any artificer or workman, employed in any arsenal or armory of the United States, to depart &c., or to break his contract with them, or who after notice shall hire or retain him, harbour, or conceal him, &c., the offender, on conviction, may be fined, not exceeding \$50, or be imprisoned, not exceeding three months. So it is a public offence, by this statute, for any workman employed in any arsenal or armory, wantonly and carelessly to break, impair, or destroy any implements, tools, or utensils, or any stock or materials for making guns, the property of the United States, or wilfully and obstinately to refuse to perform the services lawfully assigned him, pursuant to his contract &c.

ART. 5. *Assaults.*

§ 1. These, as the subject of *civil* actions, have been already largely considered in Ch. 172 and 173, and it now only remains to consider assaults, as the grounds of indictments and criminal proceedings. In those chapters, they have been defined and described; and it remains now to inquire how far, and in what manner, they are public offences, and as such, punishable.

§ 2. *Common Assaults.* I shall include in this article more than bare assaults; also batteries as well as felonious assaults. Every assault, felonious or not, includes a breach of the peace, and hence is a public offence; and in every indictment or complaint for it, the allegation is, that with force and arms, the deft. made an assault, and him, the said —, did beat, wound, and ill treat, &c. to his great damage, to the evil example of others to offend in like cases, *and against the peace.* This, in substance, the warrant that issues to arrest the offender, contains; and if an assault be accompanied by any particular acts of violence, these may also be stated in the complaint or indictment.

§ 3. *Common assault and one on a person, as a constable, is the same.* This point came up in this case. Sheldon was indicted for *assaulting and beating Eaton, a constable in the execution of his office.* Sheldon pleaded he was before convicted of the same offence &c. before a justice of the peace, and in his plea stated the proceedings before him, and averred the offence punished by the justice, and the offence charged in the indictment, were the same. To his plea, the State's Attorney demurred &c., and said the assaulting and beating *an officer in the execution of his office*, was a high and more aggravated trespass; that a justice could not try it; and different, for the trespass complained of, and tried before him, and punished by him, appeared to be a *simple assault on, and beating of Eaton, nothing being alleged as to his office.* But the charge in the indictment, it was urged, was for *assaulting and beating Eaton in the execution of his office*; so different offences. But the court held, they were the same offences, substantially; for the essence of each charge was an assault and beating; and being constable, in the execution of his office, was but matter of aggravation, that might be given in evidence. Plea in bar adjudged good, and the deft. was discharged; and the court disallowed the State's Attorney's motion to withdraw his demurrer, and reply the process before the justice was by collusion.

§ 4. *A power to correct cannot be delegated:* Decided, in this case, in which Lot Cheever was indicted for assaulting and beating a boy about fourteen years old. Parsons, the deft's. counsel, attempted to justify, and stated that the boy was put an apprentice to live with Ezekiel Cheever, the deft's. brother, and in whose family the deft. lived; that the said Ezekiel, when he left home to go to meeting &c., directed the deft. to take care of the boy, restrain, and correct him, &c.; that the boy ran away, and that, under these orders, the deft. reasonably corrected him &c. But the court decided, that the master cannot delegate his power to give reasonable correction in his absence; that, therefore, the deft. could not be

CH. 20.  
Art 5.

Indictment for Cro. C. C. 160, 184.—4 Wentw. 60, 72. Pleas &c. 4 Wentw. 313, 315, for assault and rescue. For an assault, and violently taking a receipt for a debt. 6 Wentw. 435. Mass. S. J. Court, Nov. 1789, Essex, Commonwealth v. Sheldon.

Mass. S. Jud. Court, Nov. 1799, Commonwealth v. Cheever.

CH. 201. admitted to make such defence; but the court allowed the  
*Art 5.* deft. to prove all these circumstances in mitigation of the fine.

Mass. S. Jud. § 5. *Assault with intent to kill &c.* The deft. was indicted  
 Court, June, for assaulting Blodget with intent to kill and murder him. On  
 1793, Com- Massachusetts statute, of March 15, 1785, section 3, which  
 monwealth r. enacts, "that whosoever shall make an assault, with intent to  
 Stocker.— commit murder, rape, or sodomy," shall be punished &c.; but  
 Maine act, as the statute does not use the words to *kill*, held, the indict-  
 Ch. 2. ment was informal; and should have been for a *simple assault*,  
 or for an *assault with an intent to murder*, but well enough on  
 the general issue pleaded. By acts passed in 1711, 1761,  
 1785, and 1805, assaulting with an intent to rob or steal, has  
 been, and is, viewed as a *felonious* assault, and punished ac-  
 cordingly; for these, see Robbery and Larceny.

Mass. act, § 6. By the 9th section of this act, if any convict in the  
 June 21, 1811. State prison for life, assault any person employed in the gov-  
 ernment of it, or forcibly attempt to escape &c., he is punishable  
 by *solitary* imprisonment, not exceeding a year. The same for  
 an escape. See several English cases, East's C. L. 411 &c.

Mass. act, § 7. By this act, every justice in his county, may stay and  
 Jan. 29, 1795, arrest "all *affrayers, rioters, disturbers and breakers of the*  
 sect. 2. *peace*, and such as shall *ride or go armed offensively*, to the  
 fear or terror of the good citizens of this Commonwealth, or  
 such other as may *utter any menaces* or threatening speeches,"  
 and on view or confession of the offender, or other legal con-  
 viction, bind him to the peace and good behaviour, and on  
 failure &c., to commit him until he complies: May also "punish  
 4 Bl. Com. the *breach of the peace* in any person that shall *assault or strike*  
 148 — Maine another, by fine to the State, not exceeding 20s. and bind him  
 act, Ch. 76. as aforesaid, or bind him to appear at the next Sessions. By  
 this act, a justice may punish *all assaults* &c. where the fine  
 exceeds not 20s. or \$3.33. By this act of 1797, the fine is  
 Mass. act, \$2 for riding with a naked scythe on the highway, or in any  
 March 10, lane, street, or alley.  
 1797, sect. 8.

4 Mass. R. § 8. *Justice's conviction on party's confession, no bar &c.*  
 477, Com- The deft. was indicted for an assault and battery. He pleaded  
 monwealth v. *guilty*, but added, "that he himself had informed a justice of  
 Alderman. the peace for the county, of the offence," who fined him &c.  
 The court said, it had been solemnly decided, "that a con-  
 viction of a breach of the peace before a magistrate, on the  
 confession or information of the offender himself, was no bar  
 to an indictment by the grand-jury for the same offence. A  
 like decision was made in Low's case, about A. D. 1763. In  
 neither case, was there any notice to the party injured.

Lofti, 274.— § 9. *How offenders &c. may be so joined &c.* In this case, it  
 2 Sira. 870, was held, that two may be included in one indictment, for an  
 The King v. assault against two; but formerly it was held, assault on *two*  
 Clendon.

people could not be laid in the same indictment, because distinct offences; but denied to be law; 2 Burr. 988; and a precedent was cited, of an indictment against one, for assaulting and beating *two* in the highway, to the intent to have killed or robbed them. That two or more may join, and do the *same act*, and so be jointly indicted, there is no doubt; but that an assault made on *two*, may be *one and the same offence*, and not different offences, this is clear; but in the several cases decided as to this point, the question has, and must turn on the circumstances of the particular case, whether *distinct assaults* or acts, or not. And 2 Burr. 984, an information against five defts. for singing a song, scandalizing *father, son, and daughter*. The court said, the king may call one to account for a breach of the peace, though *two* heads be broken instead of one. Many informations have been for libels against the king *and his ministers*. It is a prosecution in the *king's name*, for the offence charged. "It is not an application at the suit of each particular *party* injured. It is not like an *action*, where each person injured is respectively to recover *separate damages*." Objected two could not be indicted in one indictment, for distinct acts. The principle seems to have been admitted, that *two* cannot be jointly indicted for *perjury*, or *scolding*, or exercising a *trade* without having served &c., because the *perjury* &c. is a *separate act* in each. But *two* may well join in singing a libellous matter with intent to discredit several; all is one *entire offence*, one *joint act*.

CH. 201.  
Art. 5.

See L. Raym.  
1572.

2 Burr. 984

§ 10. *One count vera billa, one not &c.* The indictment consisted of two counts, one for an *assault*, and one for a *riot*. As to the first, the jury found *vera billa*, as to the second, *ignoramus*; and held well.

Cowper, 325,  
Rex v. Field-  
house

§ 11. *Nominal fine only.* The deft. was indicted for an assault and battery, and convicted; and the Attorney General moved for judgment; but shew no circumstance attending the case by which the court could judge of the degree of punishment that ought to be inflicted. This being the case, the court imposed a mere nominal fine.

2 Johns. Cas.  
73, The Peo-  
ple v. Cock-  
ran.

§ 12. *Assaults followed by other crimes.* It is rarely the case, that the offence indictable is a *simple assault*; but an assault is usually followed by, or connected with, some greater crime; as battery, *mayhem*, robbing, stealing; then the assault is included in the greater offence; and this greater offence is indicted, and the assault is but a part or a circumstance. But often an assault is connected, not with a greater or other crime *actually committed*, but only with an *intent* to commit it; as an assault with an *intent to ravish*, or to commit sodomy, or to kill, &c. There are many forms of indictments and of informations in our books on all these grounds of simple assaults: 2.

CH. 201. Assaults connected with greater crimes actually committed; as imprisonment, battery, *mayhem*, extorting money, assaults with rescuing goods, &c.: 3. Assaulting with intent to commit some felony &c. See various forms to these purposes, Crown Circuit Companion, Assaults, No. 1 to 22.

Art. 6.

9 Mass. R.  
387, Commonwealth v.  
Bangs.—1  
Hale, 33.—  
4 Bl. Com.  
198—May  
be by an in-  
strument.

§ 13. *Punishment of assaults.* This, besides the civil action for damages, is a fine, on conviction, on indictment, or information, or complaint; but usually indictment.

§ 14. *Assault &c. with intent to procure an abortion.* The deft. was indicted for assaulting and beating one Lucy Holman, and administering to her a certain dangerous and deleterious draught or potion, against her will, with intent to procure the abortion or premature birth of a bastard child, of which she was pregnant &c. Held, the assault and battery were out of the case, and judgment arrested, as no abortion was alleged to have followed taking the potion, and if this had been alleged, the averment, she was at the time quick with child, was a necessary part of the indictment. As to the assault and battery, *nolle prosequi* was entered. See French Penal Code, art. 317.

3 Johns. R.  
511, The  
People v.  
Petit.

§ 15. In an indictment for an assault, with intent to kill, it is sufficient to state with the usual precision, the facts necessary to constitute an assault and battery, and aver the intent with which it was made: Decided, on error assigned; was that the indictment did not state the act was done *feloniously*, wilfully, and of malice aforethought, &c.: not a felony.

ART. 6. *Bankruptcy, fraudulent.*

4 Bl. Com.  
156.—  
French Pen-  
al Code, art.  
402 to 405.

§ 1. A bankrupt system has prevailed, or been in force but a few years in the United States; but while it did exist fraudulent acts, committed by bankrupts, were by no means uncommon. The unprepared state of this country for a bankrupt system was briefly noticed in a former chapter; and it may be added, that no people whatever are prepared effectually to execute such a system, until their notions and sentiments are such as will lead them to make and execute laws on rigid, and even on severe principles. Such principles as the bankrupt laws in England, have long been made and executed upon. There the bankrupt must strictly conform all his conduct to the bankrupt laws. There it is a capital offence if he conceal or embezzle his effects, to the value of £20. So if he withhold any books or writings with intent to defraud his creditors &c. There the offence of fraudulent bankruptcy has long been viewed as “an atrocious species of the *crimen falsi*.”

Act of Cong.  
Apr. 4, 1800.

§ 2. This act, the only one of the kind adopted in the United States, inflicted far milder punishments. By section 18, if the bankrupt neglected forty-two days after notice to surrender himself, and sign his surrender, and submit to an

examination on oath, or to disclose all his property of every kind, books, papers, and writings relating to it, and in his power or possession; or if on such examination he neglected in due form of law to convey all his property whatever and wheresoever as directed by the commissioners to vest the same in the assignees, their heirs, &c. in trust for the use of all and every of the creditors of such bankrupt, proving their debts; or to deliver up his books, papers, and writings, relating to his property, except necessary wearing apparel &c.; and upon conviction of any wilful default or omission in any of these matters or things, shall be deemed and "adjudged a fraudulent bankrupt, and shall suffer imprisonment for a term not less than twelve months, nor exceeding ten years, and shall not at any time after be entitled to the benefits of this act.

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Art. 1.

§ 3. This was the punishment of a fraudulent bankrupt;—imprisonment in no case exceeding ten years, a less punishment than our laws inflict for many considerable offences, and less than the English laws inflict for many small offences. The French Penal Code, art. 402 &c. punishes bankruptcy as fraudulent, and punishes accordingly wherever he has acted very imprudently; such as gambling, excessive expenses, over-trading when insolvent, not keeping proper books, &c. Such provisions should have been a part of our bankrupt law.

## CHAPTER CCII.

### BARRETRY.

#### ART. I. *What is barrety.*

§ 1. "Common barrety is the offence of frequently exciting and stirring up suits and quarrels" among the people, "either at law or otherwise." There must be three offences at least, to make barrety; see below; and crimes punished not by fine and imprisonment, as barrety is, in common persons, also disability to practise as lawyers, are not barrety, as decided in this case, in which Josiah Abbot was indicted for common barrety in the common form. The bill of particulars (always necessary) charged, 1. That he, in the year 1790,

4 Bl. Com.  
132, 133, 134.  
—1 Haw. P.  
C 243.—  
Bac. Abr.  
280, 281.—  
Mass act,  
1811, c 62.—  
Mass. S. J. C.  
June, 1793,  
Essex, Commonwealth v.  
Abbot.

CH. 202. stirred up and prosecuted a vexatious suit against — : 2.

Art. 2. That he stirred up and prosecuted a vexatious suit against — :

3. That he in —, stirred up and prosecuted a vexatious suit against — : 4. That he forged a State note &c : and 5. That he passed one knowing it to be forged. As to the first particular, the proof was a suit in the year 1789, so this could not be given in evidence, and this failed ; and as to the fourth and fifth particulars, they were in no sense barrettry, because punishable in another way. Hence, no barrettry was proved, as only *two* offences remained, and there must be *three or more* to make barrettry. Def't. acquitted. See statute of Maine, as to officers of courts, ch. 20.

8 Co. 72, 75.  
—Indictment  
for ; Cro. C.  
C. 206 — 4  
El Com. 134.

§ 2. Coke says, one is a barretor in court, or in the country : 1. In disturbance of the peace : 2. In taking or detaining houses, lands, or goods, &c. which are in controversy, not only by force, but also by subtlety and deceit, and for the most part in suppression of truth and right : 3. By false invention and sowing of calumny, rumours, and reports, whereby discord and disquiet arise among neighbours.

Crown Cir-  
cuit Com-  
panion, 207,  
208.

§ 3. A person suing another in the name of a fictitious plt., not in being, or ignorant of the suit, is a barretor. 1 Hawk. 243. Inventors and sowers of false reports whereby discord arises, or may arise, among neighbours, are barretors ; but must be so in many cases.

#### ART 2. *What is not barrettry.*

2 Com. D.  
Barrettry, B.—  
1 Hawk. 524.

§ 1. Not to prosecute one's own suits, however numerous : nor is it barrettry to solicit suits without cause, if he do not know they are without cause ; nor is it to spend money in law-suits of another.

Mass. S. J. C.  
June, 1797,  
Common-  
wealth v.  
Curtis.

§ 2. It is not barrettry to buy up debts to off-set fairly ; as in this case Abel Curtis, the def't., was indicted for barrettry ; and in the bill of particulars he was charged with having procured four suits to be brought against Moses Fessenden, at the Court of Common Pleas, July term, 1795 ; one by Baily Bartlett, one by Timothy Osgood, one by Uriah Gage, and one by Thomas Gage, with an intention to injure and oppress Fessenden. Plea, not guilty. Agreed there must be three or more suits to constitute barrettry. It appeared that there was much litigation between Curtis and Fessenden, and a reference ; and it was reduced to a certainty, Fessenden was to have a report and judgment against Curtis for as much as £75 ; thereupon Curtis purchased said four debts at 10s in the pound, and agreed to sue and recover them at his own expense and risk, and to indemnify Bartlett &c. from any costs. It appeared it was the object of Curtis to buy only enough to set-off said £75 ; and when he sued the debts he bought of Bartlett and Osgood, he offered Fessenden to settle

and off-set ; and on his attaching Fessenden, directed the officer to keep the affair secret, so as to injure Fessenden as little as possible ; but he refused, and said he did not owe the debts to Barlett and Osgood, (Gages settled for themselves). November, 1796, they got judgment for them. Verdict, not guilty ; and the court said, that buying all debts against a man, to vex and oppress him, is barrettry. That acting with malice and intent to injure constitutes the offence ; but that in this case, Curtis only bought enough, or thereabouts, to set-off what he owed, and this he had a right to do. A design merely to balance the debt of Fessenden was no barrettry ; and though Fessenden thought he did not owe the debts, yet the judgments for them November, 1796, were conclusive.

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Art. 3.

An attorney is not a barretor for maintaining a groundless suit, to the commencement whereof he was no way privy.

1 Bac. Abr.  
281.

ART. 3. *What must be alleged in the indictment.*

§ 1. Though a barretor is one every where, yet the better opinion is as in Mann's case, that a bill ought be alleged ; but not essential. Cro. El. 195.

2 Hal. P. C.  
180, Panel's  
case.

And it is essential that the indictment be *contra pacem*. Must be *communis barretator*. 1 Sid. 282. So is *communis deceptor*. But in modern cases it is held a general charge in the indictment is sufficient ; but it need not shew in what instances, he is barretor ; but the prosecutor must give the deft. notice before the trial, of the particular instances that are meant to be proved. In our indictment it is stated, the deft. on —, at —, and divers days &c. was, and yet is a common barretor, and a continual disturber of the peace of the Commonwealth ; and also on —, at —, aforesaid, was, and still is, a common and troublesome slanderer, railer, and sower of discord among his neighbours, and that he hath procured and caused divers suits and quarrels then and there, and elsewhere, in said county among divers citizens of this Commonwealth, to the great contempt and against the peace thereof, and to the bad example of others offending in like cases.

Cro. Jam.  
629.—8 Co.  
74.—Cro. El.  
195.—1 D. &  
E. 752, Anson  
v. Stuart.—5  
Mod. 19.

The reason the indictment for barrettry, an offence incapable of being precisely defined, may be thus general, is, a bill of particular offences must seasonably be furnished the deft. by the prosecutor, and the trial is confined to the specified offences.

2 Bac. Abr.  
281.—4 Burr.  
2495.

§ 2. However the form of the indictment is not exactly agreed.

Cro. Car. 340,  
Chapman's  
case.

In this case it was held, it did not vitiate it to conclude it against the form of divers statutes ; and Cro. El. 148 : not if against the form of the statute. But whatever was the conclusion of the English indictment in cases of barrettry, whether against the form of statutes, or statute, &c., there is no

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Art. 5.

question but that our indictment must conclude at *common law*; and the reason is, there were in England formerly many statutes respecting this offence, on which the indictment was grounded. Our indictment is not grounded on any statutes; and if we have adopted these ancient English statutes, it has been only the principles of them as part of our common law.

8 Co. 74.

The indictment was *communis barretator litium et discordiarum inter vicinos seminator et pacis Regis perturbator*. First exception, it did not shew, in particular, in what he was a common barretor. Held, it need not. 2. It did not say, *against the peace*; and for this exception the indictment was quashed; Cro. Jam. 527; for *contra pacem* is an essential part of the indictment, and must be equally so here; but though held in this case, that *contra formam statuti* was also essential, it is not so here.

Palfrey's case.

ART. 4. *Massachusetts statutes*.

Mass. C. &  
P. Laws, 51.

§ 1. In 1641 the Colony legislature enacted, "that if any man be proved and adjudged a common barretor, vexing others with unjust, frequent, and endless suits, it shall be in the power of the court, both to reject his cause, and to punish him for his barrettry." This act seems to have made no distinction between such suits of his *own* and those of others.

Mass act,  
Nov. 4, 1785.  
—Maine act,  
ch. 89.

§ 2. By this act for the admission of attornies, the form of the oath is prescribed, a part of which is, "you will not wittingly, or willingly promote or sue any false, groundless, or unlawful suit, nor give any aid or consent to the same." It is difficult for an attorney to be guilty of barrettry without violating this oath.

15 Mass. R.  
227, Commonwealth v.  
Mc Culloch.

§ 3. Deft. was indicted for common barrettry. He bought up three promissory notes made by A, and left them with an attorney to collect; and he sued three actions before a justice, and might have included all three in a Common Pleas writ. Def. took the executions and caused them to be levied in a manner indicating a disposition to oppress. Not barrettry.

ART. 5. *Bribery*.

See extortion.

1 Bl. Com.  
179.—French  
P. Code, art  
174 to 183.—  
M'Nally, 450.  
452.

This is also an offence against public justice. The first instance recorded of a bribe in electing members of parliament, was in the time of Queen Elizabeth, when one Thomas Longe gave £4 to be returned a member, and was returned for that sum. Debt lies for bribery, and the action is a civil action. 3 Burr. 2267; same, 2464; and the same, 2504. The crime is complete by the *attempt* or *offer of one*, though refused; neither is it material, if the party bribed vote contrary to the bribe.

ART. 6. *What is bribery*.

4 Bl. Com.  
139. Indictment for,  
Ras. Ent. 146.

§ 1. It is defined to be, where a judge or other person concerned in the administration of justice, takes any undue reward

to influence his behaviour in his office. This is a limited definition of it. CH. 202.  
Art. 6.

§ 2. By section 21, of this act of Congress, it is enacted, that "if any person, directly or indirectly, give any sum or sums of money, or any other bribe, present, or reward, or any promise, contract, obligation, or security for the payment or delivery of any money, present, or reward, or any other thing to obtain or procure the opinion, judgment, or decree of any judge or judges of the United States, in any suit, controversy, matter, or cause depending before him or them;" such person, on conviction, and the judge accepting the same, may be fined and imprisoned, at the discretion of the court; and is forever disqualified to hold "any office of honour, trust, or profit under the United States."

Act of Cong.  
April, 1790.  
Book of As-  
sises, 43. In-  
formation  
for, in a cor-  
poration  
election, 2  
Ld Raym.  
1377—Indict-  
ment for, in  
a referee,  
Yelv. 62.

§ 3. By section 88, of this act, all customhouse officers are punished for receiving, directly or indirectly, "any bribe, reward, or recompense, for conniving, or shall connive at any false entry of any ship or vessel, or of any goods, wares, or merchandise," every such officer or other person, on conviction, forfeits, not less than \$200, nor more than \$2000, for each offence; and if there be perjury in the case, it is also punished as perjury is in other cases. Act of Cong.  
March 2,  
1799.

§ 4. Held, if I lay a wager of five guineas with A, that he does not vote for me, it is a bribe. Statute against, in Kentucky, December 19, 1801, s. 27, 28, 29. Lofft, 552.

§ 5. This act considers bribery on still broader grounds, and enacts, "that if any person shall, directly or indirectly, give or engage to pay any sum of money or other valuable consideration to another, in order to induce such other person to procure for him, by his interest, influence, or any other means whatever, any office or place of trust, within this government," he shall, on conviction, forfeit, not more than £100, nor less than £20, and forever after be disabled to hold any office or place of trust in the State. This act also provides the same penalties for receiving a bribe; but if one offender in any case, do prosecute the other, he is exempt from the punishment. The prosecutions can be only in the Supreme Court; one-third of the penalty to the informer, and two-thirds to the State. Maine act, ch 21; Kentucky acts, Toulmin's ed. 31, 32. Mass. act,  
1758.—2  
Mass. Laws,  
1039.

§ 6. These acts sufficiently describe the offences of bribery, on which hitherto there have been but very few prosecutions. The French law is much more severe and general against all public functionaries concerned in bribes, and is much the best.

And article 183: "Every judge or administrator, who shall be convicted of having been influenced in his decisions by partiality or enmity to one of the parties," is subjected to civic degradation. Our law on this subject is very imperfect. Act of Maine, ch. 21.

## CH. 202.

## Art. 8.

2 Dallas, 384,  
U. States v.  
Worrall.

And 3 Inst.  
146. Bribery  
is variously  
punished by  
statutes in  
the several  
States.

1 East, 183,  
Rex v. Beal.

ART. 7. *American cases &c.*

§ 1. In 1798, in the Circuit Court, in Pennsylvania, it was held, that *an offer* to bribe Tench Coxe, commissioner of the revenue, was an indictable offence, though the bribe was not in fact given or received. This is a very important and useful decision for the prevention of bribery, so common and ruinous in many countries; for after the bribe is received, there is but a small chance of detection. But in this case, the punishing the mere *offer* to bribe, must have a strong and salutary effect to prevent any offer, as the person to whom the bribe may be offered will be entirely at liberty to expose the offender, making the offer. This is the only case decided I have found in American books. See several like English late cases, M'Nally, 450, 452.

§ 2. In this English case, it was decided, that an indictment lay against one who was a clerk to the agent for French prisoners of war, for taking bribes in order to procure the exchange of some of them out of turn. Declaration for, 7 Wentw. 364 to 369; four counts.

ART. 8. *Challenging to fight.*

3 Inst. 147.—  
1 Haw. P. C.  
135, 138.—4  
Bl. Com. 149,  
150.—Indict-  
men for  
challenge to  
fight a duel,  
4 Wentw.  
315, 317.

This is an offence against the public peace, constructively a breach of it; as any thing that tends to provoke or excite others to break it, is an offence against the peace and good order of the state. It may be by word or letter, and it is constructively a breach of the peace to be the bearer of *challenges to fight*: and all these offences are punishable by fine and imprisonment. This is an offence often connected with duels; and so far it will be considered under that head; in which connexion, it is a very aggravated offence, and is severely punished. Where the court will not grant an information for a challenge. See Information. Cro. C. C. 182, 183; 6 Wentw. 385; 1 Hawk. 266; Statutes of Kentucky of 1799; Laws, 330.

ART. 9. *Champerty.*

4 Bl. Com.  
134, 135.—  
Haw. P. C.  
256, 258.—1  
Bac Abr.  
360, 361.—2  
Com. D. 195.  
—1 Hawk.  
563.

3 Ed. I. c. 25.

§ 1. This is also an offence against public justice; is a species of maintenance; originally signified an agreement to carry on the suit for a part of the land to be recovered (*campi partitio*) and is here an offence by our common law, and punishable by fine and imprisonment. It is now a bargain with the plt. or deft. to divide the land or other thing sued for, between the party in the suit and this champertor, if they prevail at law, and the champertor is to carry on the suit at his expense. Anciently this offence was so common, that parliament found it necessary to interpose, and pass this statute, and thereby enact, that no officer or other person shall maintain or carry on suits for lands, tenements, or other things, for *to have a part or profit thereof*, by covenant between them &c. And by this, 28 Ed.

28 Ed. I. c.  
11.

I., it is enacted, that no other person by covenant shall give up his right to another, on forfeiture of the value of the thing; but it was not to be understood to extend to pleaders for their fees, or to parents or next friends, nor to any one empowered to sue. And this act, 33 Ed. I., punishes champerty with fine and imprisonment. This statute punished champerty with a forfeiture of £10, the value of the land; and by it, no one could buy or sell land unless the vender had taken the profits of it one year before the grant made, or had been in actual possession of the land, or of the remainder or reversion.

CH. 202.  
Art. 9.

33 Ed. I.  
32 H. VIII. 9.

§ 2. Champerty is the most odious species of maintenance, and was an offence by the common law. And an agreement to have a rent or profit out of the land, by deed or parol, is champerty, and though with a disseizor; but not out of other lands.

2 Inst. 208.—  
5 Com. D. 15.

§ 3. But a grant of a part of the thing in suit, in consideration of a precedent debt, is not champerty; but such only as is made in consideration of maintenance; nor is a surrender by lessee to lessor, or a conveyance, or promise of one, by a father to a son, or by any ancestor to his heir apparent, nor a gift of the land in suit, after the end of it, to a counsellor, for his fees, without any kind of precedent bargain relating to such gift.

1 Bac. Abr.  
360, 361.

Haw. P. G.  
258.

§ 4. There is no statute of the United States or of Massachusetts, on this subject, but the offence is at common law. Prosecutions for it have been very uncommon, though the offence, no doubt, has been often committed. But this, and many other offences, often committed, are rarely prosecuted, because easily concealed, and usually will be, when concealment is for the interest of all concerned in the commission of the offences.

§ 5. New York has a statute on this subject, passed to "prevent and punish champerty and maintenance." By this act, if a person purchases lands, knowing at the time, the land is held adversely to the person of whom it is purchased, by persons claiming by deed, the purchaser is liable to forfeit the value of the land, and the improvements on it. The adverse possessor, it seems, must claim by deed.

New York  
act, Sess. 24,  
c. 87.—7  
Johns. R.  
251, 254,  
Teale, q. t. v.  
Fonda.

§ 6. But it is no champerty to purchase land in suit, if there be no intention to purchase a pretended title; as was decided in an action on said statute. As where the deed of the grantor, conveying a *pretended* title, described, generally, all the right and title to the land in a particular patent, without specifying the precise quantity or bounds, and the grantor had a legal title to, and a possession of a part, and a part was unoccupied, but another part of the same patent was in the actual possession of another person.

1 Johns. R.  
34.  
Dyck v.  
Van Beuren,  
2 to 364.  
This was debt  
to recover  
the penalty  
(q. t.) revised  
law, vol. i. p.  
345, copy of  
32 H. VIII.

c. 9, decided by 2 judges against Kent C. J.

CH. 202. sion of one who claimed and held *adversely* to the grantor.  
 Art 10. Yet held, this was not champerty, because none was intended, and especially because the purchase was made by the *bona fide* advice of counsel.

ART. 10. *Maintenance.*

1 Haw. P. C. § 1. This "is an officious intermeddling in a suit that no  
 249, b. 1, c. way belongs to one, by maintaining or assisting either party  
 53, s. 4.—4 with money, or otherwise, to prosecute or defend." "A man  
 Bl Com. 134. may, however, maintain the suit of his near kinsman, servant,  
 —3 Bac. Abr. or poor neighbour, out of charity and compassion, with impunity."  
 624.—1 Inst. This is an offence against public justice, and the punishment  
 368, 369.— is fine and imprisonment at common law. If A persuade or endeavour  
 Moore, 761.— to persuade B to be of counsel for C gratis, this is maintenance.  
 Noy. 52.— But if one tenant be sued, and all join  
 Hub. 92, 115. in the expense &c., this is not maintenance.

1 Cro. 155, In this case it was held, that if A have bills of debt due to  
 Person v. him, and he sell and assign them to B, and give B a power of  
 Hickled. attorney to recover them in A's name, at B's expense, this is  
 not maintenance; but it may be otherwise if A is to have  
 part when recovered. See case for maintenance. 11 Mass.  
 R. 549.

Co. L. 368, § 2. Coke says, maintenance is when a man maintains a  
 369.—Indict- suit or quarrel to the disturbance or hindrance of right, and is  
 ment for; 1 general or special; and is, if one unlawfully sustains plt. or  
 Burn, 121. deft. in a pending suit, by word, writing, countenance, or deed.  
 Bohun, 354 2 Inst. 208. As if a master see counsel out of his own money,  
 &c. or speak at the bar for his servant. Mod. 6. So if a servant  
 retain an attorney to prosecute a suit for his master, without  
 his consent. 2 Roll. 77. Champerty is viewed as the most  
 odious species of maintenance, and was an offence at common  
 law. 2 Inst. 208.

W. I. 28.— § 3. This act forbids the maintaining parties in quarrels in  
 23 Ed. I. st 2. the king's courts; and this act punished him who bound himself  
 by oath, covenant, &c. falsely to move or maintain pleas.  
 1 Ed. III.; 20 Ed. III.; 1 R. II. These acts only respected  
 maintenance in certain officers, who never existed in the United  
 States.

32 H. VIII. c. 9. § 4. 2d. This act of H. VIII. confirmed all former acts  
 against maintenance, champerty, &c.; and enacted, that no  
 person shall unlawfully maintain or procure maintenance in  
 any of the king's courts &c. in any of his dominions which  
 have authority to hold pleas of land &c.; nor retain for maintenance  
 of any suit &c. on pain of £10.

2 Ins. 564. § 5. 3d. But it is no maintenance for counsel to take fees  
 for advice and assistance; nor for an attorney to expend his  
 own money for his client, to be repaid; nor for a father to pay  
 fees for his son, or son for his father, not to be repaid; nor

for a master to pay fees for his servant to counsel to be deducted out of the servants wages. Mod. 6. Nor for lessor to maintain the suit of his lessee in ejectment. 2 Rol. 181; Dougl. 408. Nor for mortgagee, no party in the suit, to advance money to support the title to the mortgaged premises. 3 P. W. 375.

CH. 202.  
Art. 10.

§ 6. 4th. And generally any one having a defective, or even tortious possession of lands &c., may take a release or confirmation &c. to strengthen his title; this is no maintenance or champerty, as it rather prevents than gives rise to lawsuits. The main object of the laws against maintenance is to prevent men buying disputed titles.

Co. L. 369.  
—2 Lev. 48.

§ 7. 5. *American cases.* There have been no prosecutions of any considerable importance for maintenance in Massachusetts, and it is believed in the other States, except in New York, in which State it appears there has been some years an act (sess. 24, c. 87) to prevent and punish champerty and maintenance; on which it has been held:

§ 8. 1st. If A, in ejectment against B, get a verdict for land worth \$2500, against the deft. in June; judgment in August; and before, in July, B executes a quit claim deed for this land for \$300 to C, who knew, at the time, of this suit, trial, and verdict; this deed is void under the act: 2. To buy land pending a suit as to it, and knowing of it, and not to complete a previous bargain, is champerty, though not punishable under the statute.

8 Johns. R.  
479, 485,  
Jackson v.  
Ketchum &  
al.

§ 9. 3d. If A, out of possession, convey lands *adversely* held by B, this conveyance is void for *maintenance*; and it retains the title, though subject to the penalty of this act: so is such conveyance void in this State. But it is here doubtful at least, if such a conveyance is maintenance in A. How the plt. may declare on the demise of grantor and grantee.

5 Johns. R.  
489, 507,  
Williams v.  
Jackson in  
error.

§ 10. 4th. Nor will an action of maintenance lie against A, for carrying on a suit in B's name, or for aiding in the suit, if he has any legal or equitable interest in the land in suit; for it seems that if A has any interest in the thing in suit, he may legally take a part in it.

8 Johns. R.  
220, 228,  
Wickam q. t.  
v. Conklin.

§ 11. 5th. If A buy a pretended title, and sue in B's name, but for his own benefit, he is not guilty of maintenance on this act. Sess. 24, c. 87 Evidence of *adverse* possession to make a conveyance void must be clearly made out.

Haw. tit.  
Main. s. 12,  
13, 17, 18.

§ 12. This was a writ of right for land in North Yarmouth. It appeared in the trial that one Drinkwater had purchased of the plts. their right, and had got his deeds recorded; and that he had given bonds that the plts. should be at no costs in the suit. The court nonsuited the plts. because, as was said, the real plt. was a maintainer, though the plts. had not by law

Mass. S. J. C.  
Cumberland,  
July, 1797,  
Mc Curdy &  
al. v. Elwin  
& al.

CH. 203.

Art. 1.



4 D.&amp; E. 340.

parted with their rights, because not in possession when they gave the deed. The court ordered Drinkwater *instantly* to recognise in \$200, with two sureties, to appear at the next Supreme Judicial Court, to answer to such things as the Commonwealth should object against him; and especially for buying up a disseized title. *Quære*, as to these proceedings, especially the nonsuit. All was done suddenly, and there was no prosecution. See 8 Johns. R. 228, where such matters seem to have been better understood. See a good history, by Buller J, of the variations from time to time, in the doctrines of maintenance. According to this account, maintenance (as in fact it has been) has always been of a very changeable character.

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## CHAPTER CCIII.

### CHEATINGS, DECEITS, AND FRAUDS.

Indictments  
for; 4 Went.  
73, 77, 7  
counts.—  
Cro. C. C.  
307 to 343.

ART. 1. § 1. There is no doubt but that cheating, deceit, and fraud in trade may be punished as a public offence in sundry cases at common law, as well as on sundry statutes; but difficulty lies in drawing the line between those cheats and frauds which are only the grounds of *civil* actions already largely considered in Ch. 32 and Ch. 62, and those which are also the grounds of *indictments*, as public offences; so far as punishable by statutes, these have drawn the line; but generally, frauds and deceits are punishable only by the common law.

2 Ld. Raym.  
1179.—2 D.  
& E. 584.

§ 2. *What cheatings &c. are indictable &c. on American statutes.* Of so much importance is fair dealing that almost every legislature has found it necessary to enact many statutes to prevent cheating, deceits, and frauds, in trade; not only generally, but in particular branches of business, as in the weight of bread, in the making of nails, in the exportation of butter, and other commodities, &c. These matters being generally left to the individual State governments, we find no statutes of the United States relating to them; and so far as punishable in the Federal districts, they have hitherto been punished on the principles of the common law; and this is generally the case in the several States; however, some State statutes have been passed in relation to these offences.

§ 3. By section 4 of this act it is enacted, "that wherever any person shall be hereafter convicted before" the Supreme Judicial Court, "of any gross frauds or cheats, the court may in addition to, or in lieu of, former punishments or penalties, inflict on the offenders the punishment of hard labour, not exceeding seven years."

CH. 203.  
Art. 2.

Mass. act,  
Nov. 1. 1785.  
—Maine act,  
ch. 13.

§ 4. By this act it is provided, "that all persons who knowingly and designedly by false pretence or pretences shall obtain from any person or persons money, goods, wares, merchandise, or other things, with intent to cheat or defraud any person or persons of the same, shall, on conviction," before the Supreme Judicial Court, or Municipal Court in Boston, be fined to the State, not less than \$40, nor above \$400, or confined to hard labour not above seven years; and by section 2, these courts have "exclusive jurisdiction of all gross frauds or cheats at common law;" and any person convicted in either court of such fraud or cheat, may be punished as in the first section. This act is very general, and seems to embrace all cheatings, deceits, and frauds designedly committed. Two questions will arise in practice upon this act: 1. What is to be understood by *false pretence*: 2. What is a *gross fraud or cheat*. Perhaps this act may be construed as intended only to alter the mode of punishment, and to leave the words *false pretences*, and *gross frauds or cheats*, to be construed as formerly at common law. If so, we may now consider these offences as known by that law. But *quære*.

Mass. act,  
Feb. 1816.—  
Maine act,  
ch. 13.

ART. 2. *What is an indictable cheat or fraud at common law.*

This case affords an important principle of construction in these cases. Young was indicted for getting money of one Thomas by false pretences, on the 30th Geo. II. c. 24. This indictment contained several charges of the same nature in different counts. Young, on ———, at ———, as was stated, knowingly, designedly, &c. did falsely pretend to Thomas, that Young had made a bet of 500 guineas on each side with a colonel at Bath, that William Lewis would the next day run on a road &c. ten miles in an hour; that Young and Mullins did go 200 guineas each of said bet, and Randal did go 100; and did under colour and pretence of this bet &c. obtain of Thomas 20 guineas, as part of said pretended bet of 500 guineas; by which false pretences the four defts. on ———, at ———, unlawfully, knowingly, and designedly obtain of Thomas said 20 guineas with intent to cheat and defraud him thereof; whereas, in fact, no such bet had been laid; against the peace, and against the form of the statute (30 Geo. II. c. 24.) The defts. were convicted &c.; and brought error; and urged the transaction as stated, was not

3 D. & E. 98,  
107, Young  
& al. in error  
v. The King,

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the subject of a criminal prosecution ; for before 33 H. VIII. c. 15, there were two constituent parts of cheating at common law : 1. It was necessary the act itself did affect the public : 2. That ‘it must be such, against which common prudence could have not guarded.’ Haw. P. C. c. 71 ; 2 Burr. 1125 ; then came said 33 H. VIII. which made it an offence to obtain money by *false tokens*. Hence, the only alteration that act made in the law, was that, in order to bring the case within it, some false token must be used ; then came 30 Geo. II. c. 24, making it an offence to obtain money by *false pretence*. Defts. said, these words did not extend the law to cases, “against which common prudence may guard.” Now here was a mere naked lie, they said, against which Thomas by common prudence might have guarded. But the court held, the judgment must be affirmed ; for this indictment, founded on 30 Geo. II., is different from the common law indictment. This statute extends to every case where a party obtains money “by falsely representing himself to be in a situation in which he” is not, “or any occurrence that had not happened, to which persons of ordinary caution might give credit.” The 33 H. VIII. required a false seal, or false token to be used in order to bring the person imposed upon into the confidence of the other ; but that being found to be insufficient, the statute of 30 Geo. II. c. 24, introduced another offence, describing it in terms extremely general.” Lord Kenyon thought it very difficult to decide to what cases this statute extended ; but no doubt it extended to this case. Also held, where the pretence is conveyed by words, spoken by one deft. in the presence of others, who are acting in concert together, they may be all indicted *jointly*. As this act as to false pretences, is worded like ours of February 16, 1816, this case, as far as it goes, is a fair construction of our statute ; so that if one by a mere lie (false pretences) now obtain property of another, he may be indicted on this act. Hence, this act has created a new offence, as is allowed 30 Geo. II. did. Passed, said Ashhurst J. “to protect the weaker part of mankind.” And per Buller J., the 30 Geo. II. “clearly extends to cases which were not the subject of an indictment at common law.” “Barely to ask another for a sum of money is not sufficient ; but some pretence must be used, and that pretence false ;” and the intent to cheat or defraud, “is necessary to constitute the offence.” “If the intent be made out, and the false pretence used, it brings the case within the statute.” The same may be observed of our statute of February, 1816.

ART. 3. *A naked lie not indictable at common law.*

2 Burr. 1125  
&c. The King  
v. Wheatly.

§ 1. *English cases.* The deft. was indicted, for that he, intending to deceive and defraud one R. Webb of his monies,

on ———, at ———, falsely, fraudulently, and deceitfully did sell and deliver, and cause to be sold and delivered to said Webb, sixteen gallons, and no more, of certain malt liquor, commonly called amber, for, and as, eighteen gallons of the same liquor; so wanted two gallons &c.; the deft. knowing this &c. received pay for eighteen gallons &c., so defrauded Webb &c. Verdict, guilty. Judgment was arrested, because not stated he used false measures; hence, a mere lie, as to the quantity. Webb might have measured the liquor; but common sense is no security against false weights and measures, false tokens, or conspiracies to cheat; but there were none such in this case, but only a private imposition, or deception on Webb, who carelessly accepted the liquor without seeing to the measure. Lord Mansfield also said, that selling an unsound horse as, and for, a sound one, is not indictable. And 1 East, 185; 1 Dallas, 41, 47.

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Art. 4.

Indictment  
for obtaining  
money by  
false pre-  
tence; 4  
Wentw. 357,  
358.

§ 2. A came to B, and received £20, on pretence C sent him. Held, not to be indictable. 6 Mod. 311, Queen v. Hannon, a like case; for in these cases no false tokens were used to deceive.

Salk 378.—  
1 Mod. 222.

§ 3. Held in this case, if A come to B to buy tickets, and gives B an order A has no right to draw, and which A knows will not be accepted; so gets the tickets; this is not an indictable offence. This order or check on a banker was no false token, it left his credit just where it was before.

6 D. & E.  
565, Rex v.  
Lara.

§ 4. Held, that knowingly to expose to sale, and selling wrought gold under the sterling all-y, as and for gold of the true standard weight, is only a private imposition in a common person, and not indictable as it respects him; but is an indictable offence in a goldsmith.

Cowp. 323,  
Rex v.  
Bower.

§ 5. Indictment on 30 Geo. II. c. 24, for obtaining money on false pretences. Held, sufficient to allege the deft. unlawfully, knowingly, and designedly pretended so and so; by means of which said false pretences he obtained the money; afterwards negating such pretences to be true, though it be not alleged in terms that he falsely pretended &c. But 2 D. & E. 581: the indictment must state what the false pretences were: so what the false tokens were.

2 East, 30,  
Rex v. Airey.

Rex v. Mason,  
2 Stra. 1127,  
Rex v.  
Menog.

#### ART. 4. *American cases.*

§ 1. In this case Josiah Abbot was indicted and convicted, and fined \$50, for a fraud in stealing and carrying away a summons whereby the party was defaulted, not having notice of the suit and judgment; also if the fine was not paid in ——— days, the offender was ordered to be whipped.

Mass. S. J. C.  
June, 1793,  
Essex, Com-  
monwealth v.  
Abbot.

§ 2. See the case of Commonwealth v. Warren, Ch. 62, a. 3, in which the true distinction at common law is taken between false *measures* &c., *tokens* &c., and a *mere lie*.

6 Mass. R. 72.

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Art. 5.

1 Mass. R.  
137.

1 Dall. 41,45.

1 Dallas, 47,  
Respublica v.  
Powell.Wilder's  
case.2 Ld. Raym.  
865, The  
Queen v.  
Parry.Act of Con-  
gress, March  
26, 1804.

§ 3. Indictment quashed against Allen, a deputy sheriff, for a fraud in receiving of the debtor on execution, 13s. 4d. more than he acknowledged, or paid to the creditor; for it is a mere private fraud, not an indictable offence. June, 1795.

§ 4. So *Commonwealth v. Hearsey*. Judgment arrested, because the deft. was indicted for a mere breach of contract.

§ 5. Indictment lies for a cheat of such a nature as may prejudice, though it does not charge that any person was actually defrauded.

§ 6. Held, it is an indictable offence, if a public officer cheat in marking barrels of bread, as of the weight of 88 pounds each, when in fact they only weighed 68 pounds each: but *quære*, on what principle was this case decided; perhaps on the ground of a fraud in a public officer. He used no false weights or measures, no false tokens; nor was there any conspiracy to cheat. And in *Rex v. Wilder*, cited 2 Burr. 1128. Held, the deft. was not guilty of an indictable offence, though he sent vessels, to Mr. Hicks, of ale, marked as containing such a measure, and wrote a letter to him, assuring him they contained that measure, when in fact they contained much less: all merely his false affirmations.

§ 7. Defts. were indicted for pretending to be officers in the land bank, and cheating J. S. of £14, and for pretending to aid him in procuring him office of messenger; whereas there was no such office. Motion to quash denied; because it was a cheat, and the deft. might demur. There is a similar provision in the French Penal Code, art. 305, which fines and imprisons those who by "fraudulent devices persuade others of the existence of any imaginary undertaking, or speculation; or raise false hopes &c., and obtain money thereby.

#### ART. 5. *Frauds in casting away ships &c.*

§ 1. This act provides, that "any person, not being the owner, who shall, on the high seas, wilfully and corruptly cast away, burn, or otherwise destroy any ship, or other vessel, unto which he belongeth, being the property of any citizen, or citizens, of the United States, or procure the same to be done, and being thereof lawfully convicted, shall suffer death."

§ 2. By sect. 2, it is felony and death for any person on the high seas, wilfully and corruptly to cast away, burn, or otherwise destroy any ship, or vessel, of which he is owner, in part or in whole, or in any wise direct, or procure the same to be done, with intent or design to prejudice any person or persons that hath underwritten, or shall underwrite policies of insurance thereon; or to prejudice any merchant that shall load goods thereon, or any other owner of such ship or vessel.

§ 3. About a year previously, the legislature of Massachusetts passed an act to prevent the wilful destruction and casting away of ships and cargoes in *the body of any county* of this Commonwealth. Enacts, if any owner, or officer, or mariner, belonging to any vessel, shall, within the county &c. "wilfully cast away, sink, or otherwise destroy the ship or vessel of which he is owner, or to which he belongeth, or in any wise direct, or procure the same to be done, with intent or design to prejudice any person or persons that hath, or shall underwrite any policy or policies of insurance thereon; or of any merchant or merchants that shall load goods thereon, or of any owner or owners of such ship or vessel;" and being convicted thereof, shall be adjudged a felon, and imprisoned for life, or not less than five years.

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Art. 6.

Mass. act,  
March 8,  
1803.—  
Maine act,  
ch. 14.—  
Ken. act,  
Dec. 19,  
1801.

§ 4. By sect. 2, provision is made for punishing for fitting out a vessel with intent to destroy her; and fit her out *within this Commonwealth*, with such intent, to the prejudice of any person, who is secured by the first section against such acts; punishment, fine not exceeding \$5000, pillory, and imprisonment, not less than two, nor above ten years.

§ 5. By sect. 3, provision is made for punishing owners of vessels or of goods laden on board any such vessel, who shall make out and exhibit, or cause to be made out or exhibited, any false or fraudulent bills of parcels, invoices, or estimates of any such goods, laden or pretended to be laden on board of such vessel, with intent to defraud any underwriter &c. Punishment, fine not above \$5000, pillory one hour, and imprisonment, not above ten years.

§ 6. By sect. 4, false affidavits are punished to deceive and defraud any underwriter &c. on vessel or goods. Punishment as in the third section.

An indictment lies for wilfully, deceitfully, and maliciously supplying prisoners of war with unwholesome food, not fit to be eaten by man.

East's C. L.  
821, A. D.  
1796.

ART. 6. *Deceits and frauds in particular trades, and branches of trade and commerce.*

The statutes to punish these offences, are very numerous, and generally passed by our State legislators. Many such have existed from the early settlements of the country, and have often been revised. Some of them are local in their operation; some general. They are usually all framed on one principle; they direct trades to be conducted, and wares and goods to be fabricated, and put up for market in a certain manner described, and for doing otherwise, inflict pecuniary penalties. For instance,

Indictment  
for selling  
beer by  
short mea-  
sure, 4  
Wentw. 353,  
359.

§ 1. In the year 1711, an act was passed for regulating the size of bricks, directing how the clay should be managed, and

A. D. 1711.

CH. 203. how the bricks should be made, and of what size, and the inspection of them ; on certain penalties &c.

Art. 6.

Mass. act,  
March 31,  
1788.—  
Maine act,  
Ch. 159.

§ 2. By this act, it is enacted, that if any owner of any green or unmanufactured calf skins, or other person employed by him, shall lade &c. to export out of this state any such skins, or if any master of a vessel &c. receive such, he incurs a penalty of one dollar for each and every such skin, so shipped, or attempted to be shipped, and the skins are forfeited, and may be seized on a justice's warrant. Fines and forfeitures, a moiety to the informer, and a moiety to the Commonwealth. And by a general clause in a certain act, whenever a fine or forfeiture is in whole or in part to the use of the Commonwealth, it may be recovered by information or indictment.

§ 3. A multitude of other acts of this kind exist, and long have existed, in various forms, in relation to the surveying, inspection, approving, marking, and regulating lumber of various kinds, beef, pork, pot and pearl ashes, butter, tobacco, and fish of various sorts, onions, lime, nails, flaxseed, hog's lard, casks, malt, rum, and other commodities. In order to prevent deceits and frauds in the sales of such commodities, and especially when exported, the penalties and forfeitures in which cases are sometimes recoverable by actions *qui tam*; sometimes by complaints and informations, and sometimes by indictments.

1 Wils. 301,  
Rex v. Com-  
brene.

§ 4. The indictment was, that the deft. did fraudulently and deceitfully deliver A 274 gallons of beer, when he ought to have delivered 288 gallons, as was agreed, and paid for. Held, not indictable; is a mere action of deceit, in not delivering the quantity sold and paid for.

3 Burr. 1697,  
Rex v. Os-  
born.

§ 5. The deft. was indicted for selling *as* two chaldron of coals, a quantity *defective*, by so many bushels, specified in the indictment. This was quashed; not selling by false measure; not so expressly charged as it should have been, but only left to be collected by implication. "Not indictable," said justice Wilmot, "because it is in every body's power to prevent this sort of imposition;" "whereas a *false* measure is a *general* imposition upon the public, which cannot be well discovered. If vessels have the *private* marks of the seller, as containing so so many gallons &c., it is no more than his affirmation."

East's C. L.  
820.

Mass. act,  
Feb. 27, 1800.  
—Maine act,  
Ch. 161.

§ 6. *Stamps in manufacturing shoes &c.* This act authorizes "each manufacturer of leather, or of boots, half-boots, shoes, pumps, sandals, slippers, or goloshoes," to stamp said articles, by him manufactured, "with the initial letters of his or her christian name, and his or her surname, at large, and the name of the town or place of his or her abode; and such stamping shall be considered as a warranty, that the article stamped is merchantable, being made of good materials, and well manufactured." Not merchantable unless stamped. Section 3

enacts, if any person "fraudulently stamp, or aid or abet in fraudulently stamping either of the articles aforesaid, with the name or stamp of any other person," he forfeits, not above \$100, or may be imprisoned, not above six months, or both. This ought to be by indictment.

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§ 7. To make a cheat indictable at common law, it must be a fraud affecting the public; a deception common prudence cannot guard against. As by using *false weights or measures*, or *false tokens*, or there must be a *conspiracy to cheat*. A got judgment against B, and he offered to settle it by paying part in money, and giving his note for the rest. A wrote a receipt in full; B got possession of it, without paying or giving the note. The indictment alleged, he obtained the receipt falsely, fraudulently, and deceitfully, and under false acts and colours, &c. Held, no indictment lay, for there was no *false token*, but only a false assertion.

7 Johns. R.  
201, The  
People v.  
Babcock.

ART. 7. *Late decisions as to false pretences and general principles.*

§ 1. The deft. applied to A, telling him he was intrusted by B to take some horses from Ireland to London, and that he had been detained so long by contrary winds, that his money was spent. B was thereupon induced to advance some money to A; but it afterwards appeared the whole story was a fiction. The deft. was convicted as a cheat, on 30 Geo. II.

East's C. L.  
830, Rex v.  
Count Ville-  
neuve.—2 D.  
& E. 584.

§ 2. Witchell was indicted on the same statute, for obtaining money from A. & H. Austin, by *false pretences*. They were clothiers at W—, and the deft., a shearman in their service, and employed to superintend the other shearmen, and to take an account of the persons employed, and of the amount of their wages and earnings. At the end of each week, he was supplied with money to pay the different shearmen, by the clerk of A. & H. Austin, who advanced to him such sum, as, according to written account or note, delivered to him by the prisoner, was necessary to pay them. The prisoner was not authorized to draw from the clerk for money generally on *account*, but merely for the sums actually earned by the shearmen; and the clerk was not authorized to pay him any sums except what he carried in his account or note, as the amount of what was due to the shearmen for the work they had done. The prisoner, September 9, 1796, delivered to the clerk a note, in writing, in this form: "9th September, 1796; shear-men £44. 11s. 0d.;" which was the common form in which he made out his account of the amount of their week's wages. He placed in a book, his business to keep, the names of the men employed, of the work they had done, and their earnings; the names of several men who had not been employed, who were entered as having earned different sums of money, and

East's C. L.  
830, 831,  
A. D. 1798,  
Witchell's  
case.

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false account of the work done, by those who had been employed, so as to make out the sum stated in the note, to be due to the shearmen. The jury found the deft. guilty. His counsel urged, that no cases were within the act (30 Geo. II.) but those where the original credit was obtained by means of the *false pretence*; and that it did not extend to cases where there was a previous confidence, as they said was the case here. Finally, all the judges agreed on the principle, *that if the false pretence created the credit*, the case was within the statute, and that in this case, the deft. would not have obtained the credit but for the false account, which he had delivered in; so properly convicted.

East's C. L.  
831, Airey's  
case.

§ 3. *General principles.* One Airey was indicted; and the indictment charged, that A. at K. &c. delivered to the deft., a common carrier, certain goods to be carried by him from K. to one Leach at L. there to be delivered &c.; that the deft. received them under pretence of carrying and delivering them, and undertook so to do; but that, intending to cheat A. of his money, he afterwards unlawfully &c. pretended to A. that he had carried the goods from K. to L. for the purpose of delivering them to Leach, and had delivered them to him at L., and that he had given him, the deft., a receipt, expressing such delivery of the goods to him, but that he had lost or mislaid the same, or had left it at home; and that the deft. thereupon, demanded of A. 16s. for the carriage of the said goods, by means of which false pretences, he obtained the money &c. Conviction and judgment, and on a writ of error, it was affirmed. According to these cases, generally, where money not due, or too much money, is demanded and obtained by one in business, by false accounts exhibited, or by false representation, he is liable to be indicted on the statute for obtaining money by *false pretences*. This statute is much more general than the 33 H. VIII. which mentioned *privy tokens*, and *counterfeit letters in other men's names*. The 30 Geo. II. (like ours of 1816,) was passed purposely in order to supply the deficiencies of 33 H. VIII. These acts and the common law, include every cheat effected by means of any *false tokens*, having the *semblance of public authority*, or in any manner touching the public, or in any manner by conspiracy or forgery. But both statutes are confined to *money or goods*; and East doubts if they extend to *choses in action*. But our act of February, 1816, extends to money, goods, wares, merchandise, or *other things*. These words, or *other things*, may, it is conceived, include *choses in action*. And in applying this act, as well as the 30 Geo. II. there seems to be no need of the offender's using the name of a third person in cases of cheating.

Comment.

§ 4. The 33 of H. VIII. seems to have introduced *privy* tokens, and made cheating, with them, indictable, because the common law, in *private* transactions, did not; but that law, in these respects, made only cheating indictable, effected by means of false tokens of a public nature; as false weights and measures, established by public authority; and false marks known and used in trade generally. Hence, though a false token (other than a forgery) be used in cheating, yet it seems, to make the offence indictable by that law, only when this token is one in use by public authority, or one used as a sort of *common* mark or stamp, and not the *mere private* mark or token of one man only. 33 H. VIII. if not in force here, is no part of our law. Then by this, all cheating, indictable, depends on the common law, and the above broad expressions in our statutes. In all cases, whether the indictment be grounded on the common, or on statute law, the false token, or false pretences used, must be set forth, and described in it; that the court may see they are such tokens or pretences as are essential in the commission of an indictable offence. And generally, they ought to be described as they were shewn to the party at the time he was imposed upon; and it must be alleged in the indictment, (if not in express terms,) that the token or pretences were false, and that the money, goods, or other things, were obtained by means of those stated in the indictment. Several may be indicted jointly, as in Young's case, above.

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§ 5. At common law, the principle is obviously this: this law gives the party a remedy only when he is cheated or deceived by some false token, mark, or stamp of a public nature; that is, one so established and sanctioned by statute law, or by usage, as to be viewed by many people, and received by them, as a token &c., by some law, or by some usage among them. As where a law or settled usage, for instance, allows no barrel beef to be merchantable but when it is marked, or stamped, in a manner the law or usage directs; and when the mark is thus publicly known and used, the rule is founded in reason, that protects the buyer, deceived or cheated, by the seller's falsely, and fraudulently affixing this mark. The law will not deem one negligent, who trusts such a public seal, but will, on every sound principle, rather punish him who falsely and fraudulently uses it. But when a man uses only his *private* token, mark, stamp, or seal, as evidence of a fact; as that the goods he sells are so much in quantity or weight, or of such a quality; this private evidence is clearly no more than his bare affirmation, the fact is so and so, and then it is the duty of the buyer to be on his guard, and to examine into the fact, and if he allows himself to be cheated by a mere lie in such

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East's C. L.  
860.2 Maule &  
Sel. R. 379,  
392, The  
King v. Per-  
rott.

a case, the law puts him to his civil action ; but will not give him a remedy by indictment, or other public prosecution at the public expense.

To constitute a cheat properly defined, there must be a prejudice received, in fact, both at common law, and on the statutes, that is, some one must in fact be cheated and wronged. Otherwise, as to real forgery ; the crime is committed by the act of fabrication or alteration, though no one, in fact, be prejudiced. (See Forgery.) If one might be prejudiced.

§ 6. *False pretences*—how to be alleged in an indictment on 30 Geo. II. c. 24, for obtaining monies by. It must negative, by special averment, the truth of the pretences the offender used ; not enough to charge, the deft. falsely pretended &c., setting forth the pretences ; cases cited, 2 Haw. P. C. ch. 25, s. 60 ; 2 Hale's P. C. 152 ; Cro. El. 490 ; 3 Bos. & P. 107 ; 2 East, 30 ; 2 D. & E. 581 ; 3 D. & E. 102.

§ 7. It will be observed, that many misdemeanors and small offences appear in a considerable degree in Massachusetts' statutes, cited in this digest and abridgement. The reason is, such offences are common in every civilized society, and in every State in the Union ; and in every one there are, and must be such statutes against them, and to punish them when committed ; and it is proper to include such laws in a work of this kind, in order to give a proper view of the law of the land ; and in several cases there have been so few reports respecting them, so few judicial decisions, that no way was found to bring them into view, but by citing or abridging the statutes themselves ; and it was found best, to take those of some one State only, being, in substance the laws of each State, in these respects ; adding cases found, decided, and reported, in other States, on these subjects. These remarks will apply to several other cases ; for as yet, the judicial decisions as to them, have been so few, that the laws in relation thereto, can appear in no considerable degree, but in the statutes, as will appear in different parts of this work ; and such is the genuine law, but judicial constructions of it are yet wanted. Most of the laws against the lesser offences are administered and executed by police officers, and the inferior courts, whose decisions are not reported ; hence, on the subjects of these laws, near all the published law we have is the statute law ; and often, by citing, or extracting the marrow of a statute, or form in pleading, we have the law on any particular subject, in the clearest and most concise manner.

§ 8. *Various inspection laws.* These are long and numerous in Massachusetts, and often varied ; as to beef, of March 4, 1800, and repealed former laws ; of pork, March 11, 1802. So as to tobacco, pot and pearl ashes, butter, hogs-lard, lime, nails, &c. See the statute book.

In the year 1821, all such statutes were well consolidated in Maine. As to beef and pork, in ch. 148 ; as to butter, hogs-lard, in ch. 149 ; as to pickled and smoked fish, in ch. 150 ; respecting pot and pearl ashes, ch. 151 ; hops, ch. 152 ; measuring malt, ch. 153 ; tobacco and onions, ch. 154 ; as to flax-seed, ch. 155 ; stone lime, ch. 156 ; nails, ch. 157 ; as to boards, shingles, clapboards, hoops, and staves, ch. 158 ; hogshead shooks, ch. 159 ; as to fire-wood, bark, and coals, ch. 160 ; as to calf-skins, boots, and shoes, ch. 161 ; fire arms, ch. 162 ; paper, ch. 163. All these laws are made to prevent cheating and frauds, and it is penal to violate them. Also lighters, Massachusetts act, March 7, 1801 ; Maine act, ch. 172 ; Massachusetts act of June 15, 1815 ; Kentucky act, December 13, 1798 ; January 26, 1798 ; December 20, 1796. These acts, (Virginia law revised,) respect the inspection of tobacco, flour, and hemp. Toulmin's Ken. laws, p. 426 to 447.

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